Third parties' right to compensation for oil pollution damage caused by ships

A comparative study of the Norwegian and Spanish legal regimes based on the international framework

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PREFACE

Annex I is a supplement to the thesis, and shall not be subject to assessment.

I
Legal framework and method

1 Presentation of the subject

The IMO Oil Pollution Conventions consist of two sets of Conventions. The first is composed by the CLC 92[1], the 1992 Fund Convention[2] and the 2003 Supplementary Fund Protocol,[3] and regulates a third party's right to compensation for oil pollution damage caused by tankers. The second set consists of the Bunkers Convention of 2001,[4] which introduces an international regime to govern the right to compensation for oil pollution damage caused by non-tankers. Prior to 21 November 2008, this was a legal area in which the injured parties were at the mercy of national regulation.

Even though these Conventions contain substantial rules made to create rights and obligations for both private and public legal subjects, they will only constitute an obligation of the Contracting State until they have been properly enacted into national law through incorporation. A different practice would inflict with the States' sovereignty. When a Convention first has become part of the national law, it will also be subject to the interpretation and application of domestic courts. In the course of these procedures, it is likely that each Contracting State will affect the original uniformity of the Conventions by their method of incorporation, or by the interpretation and application supplied by both national principles of interpretation and substantial rules of law.

In order to further analyze these aspects, I will compare the Norwegian legal regime on an injured party's right to compensation for oil pollution damage caused by ships with the one of another Contracting State to the Oil Pollution Conventions. The reason why I have chosen Spain does not only lie in their accession to the same, amended versions of the Conventions, but also in several

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1 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969 (the consolidated text as amended by the 1992 Protocol is referred to as CLC 92). There are still some Contracting States to the CLC 69, see footnote 26 on p. 3.

2 1992 Protocol to the International Convention on the Establishing of an International Fund for Compensation for Oil Pollution Damage 1971 (The consolidated text as amended by the 1992 Protocol is referred to as 1992 Fund Convention)

3 The 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund

4 International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention)

aspects of their legal system that might make this an interesting analysis. These aspects do in principle reflect the difference between a legal method based on statutory and non-statutory principles, the relationship between national and international law in terms of monism and dualism, the status of incorporated, international provisions, the organization of the legislative material on maritime law, and the different national provisions supplementing the Oil Pollution Convention. Yet another thing is that the numerous oil spills in Spanish waters have resulted in both prosecutions and civil claims for compensation. The spills of the Urquiola (1976), the Aegean Sea (1992) and the Prestige (2002) are the incidents that have caused the most recent large scale oil spills,[5] and they all polluted the Galician coast in north-western Spanish. Even though many Spanish claimants have presented their claim directly to the 1971/1992 Funds,[6] many have also chosen to take theirs to court in order to have it assessed in the criminal process. As all these incidents have resulted in criminal processes before a domestic court, the Spanish experience can be used as a practical example on the coordination of rules with both national and international origin.[7]

2 *Problem description and limitation*

The components and application of the Oil Pollution Conventions, as well as problems related to low limits of liability is well and thoroughly discussed in the available, updated literature.[8] My intention is not to make a complete presentation of the applicable, international rules, but to see how the internal legal regimes of the Contracting States affect their original uniformity in relation to their principal purpose, namely to ensure that injured third parties receives prompt and adequate compensation for oil pollution damage.

The national impact can be divided into the underlying, methodical aspects that lie in the incorporation as such, and the phase in which international measures are put into practice through the national legislation. The method of incorporation decides how the content of the conventions are expressed within the national legal regime, as well as their hierarchical status among other

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5 See the illustrative map in Annex I

6 See *Annual Report 2008. Report on the activities of the International Oil Pollution Compensation Funds in 2007*. London, IOPC Funds, 2009. http://www.iopcfund.org/npdf/AR08_E.pdf [1 June 2009]

7 See Chapter IV10.3.1

8 See for instance de la Rue, Colin and Charles B. Anderson. Shipping and the Environment: Law and Practice. 2. ed. Series: Lloyd's Shipping Law Library. London, 2009

sources of law. When put into practice, the incorporated measures will be interpreted and applied by national courts together with adjacent, internal legislation, and to some extent also supplied by internal rules. Nevertheless; differences between the contracting States to one single convention may also be caused by the possibility to make reservations and enact optional clauses.

These factors boil down to one, principal problem of discussion: Do the national incorporation and interpretation of the Oil Pollution Conventions cause divergence between the Norwegian and Spanish rules on a third party's right to compensation for oil pollution damage caused by ships?

Even though the title and the problem of discussion give way for a wide range of interesting topics, I am obliged to keep this thesis within the strict limit of 40 000 words and a couple of months of combined research and writing. On this background, I will only be discussing the national context provided by the Norwegian and Spanish legal regime. I will also seek to maintain the focus on the purely national aspects that might have an impact on the injured party's right to compensation for oil pollution damage. However, in order to locate domestic aspects in their larger frame of reference, I will make brief comments on adjacent topics that could have been further discussed if time and space had allowed. Without prejudice to these in-context references, the thesis will be delimited from discussing problems resulting from different conventions and liability limits being applicable throughout the world, as well as international and national[9] rules obliging States or ship owners to take measures to prevent or deal with marine incidents. Neither will I focus explicitly on penal measures[10] nor administrative[11] sanctions for oil spill pollution.[12]

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9 See Sections 7, 28, 74 and 76 of the Norwegian Pollution Control Act of 13 March 1981 No. 6 (*Forurensningsloven*, NPCA), NOU 2002:15 *Ansvar for oppryddingstiltak etter sjøulykker* Chapter 3.4, St.meld.nr.14 (2004-2005) Chapter 8.18 and Sections 20 and 28 et seq. of the Harbour Act of 8 June 1984 No. 51 (Havneloven).

10 Case C-440/05 (OJ C 315, p. 9) was preceded by two legislative measures: Directive 2008/99/EC on the protection of the environment through criminal law (OJ 2008 L 328, p. 28) and the Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements (COM(2008)134). This Proposal has not been adopted. Directive 2005/35/CE has been carried out in the Spanish legislation through the State Ports and Merchant Shipping Act (Ley 27/1992, LPEMM), R.D. 1398/1993, R.D. 1772/1994, R.D 91/2003 and R.D. 394/2007. As for penal measures for pollution damage under Norwegian law, see Section 78 NPCA, cf. Sections 152 b and 48 a-b of the General Civil Penal Code (Lov av 22/05/1902, *Straffeloven*).

11 Within the Spanish legislation, the regime of administrative fines for causing oil pollution damage is governed by the LPEMM (Ley 27/1992), see Art 115.b. If an action is subject to both an administrative remedy and a penal sanction, only the latter will apply, see Art 119.3 LPEMM.

3 *Outline of the thesis*

Part II contains a presentation of the legal framework and method which is meant to provide the reader with a preliminary overview of the international, Spanish, Norwegian and to a certain extent also Community secondary legislation that will form the base for the further analysis. Part III is devoted to the first part of the principal problem of discussion, namely whether the national *incorporation* of the Oil Pollution Conventions cause divergence between the Norwegian and Spanish rules on a third party's right to compensation for oil pollution damage caused by ships. The analysis is continued in Part IV, in which I will focus on the interpretation of the Oil Pollution Conventions within the Norwegian and Spanish legal context. This part of the thesis relates to the second part of the principal problem, namely whether the national *interpretation* of the Conventions cause divergence between the Norwegian and Spanish rules. Any differences between the national regimes will be consecutively commented on, and some final lines will be drawn in the conclusive remarks of Part V.

I have also included an Annex I, which does not form part of the thesis as such. Neither shall it be subject to assessment. The reason why it is included is merely to give an example on particular national measures that might be adopted to ease the process of obtaining compensation for the injured third parties.

As for the translation of legal documents, I will seek to apply published translations whenever available.[13] Unfortunately, most Spanish legal sources, except their Constitution,[14] are not available in an English version. In these cases, I will do my best to express an accurate translation. I have however chosen to use some original Spanish words, and rather explain their content in English.

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12 Both the sinking of the Aegean Sea (1992) and of the Prestige (2002) was followed by criminal proceedings before Spanish courts. According to Article 109.1 of the Spanish Criminal Code (Ley Orgánica 10/1995, CP), every person who is criminally responsible is also liable for the civil damages caused by commission of the offence. However, the application of this particular internal rule in combination with the incorporated Oil Pollution Conventions give grounds for some particular problems of discussion which are discussed in Chapter IV10.3.1.

13 The English translation of the Norwegian Maritime Code (NMC) was originally made by Peter Bilton at the request of the Ministry of Justice, and thereafter further elaborated by Trond Solvang and Erik Røsæg, available from .http://www.ub.uio.no/ujur/ulovdata/lov-19940624-039-eng.pdf [1 June 2009]. Other public translations of Norwegian legislation can be found on http://www.ub.uio.no/ujur/ulov/english.html [1 June 2009]

14 http://www.boe.es/aeboe/consultas/enlaces/documentos/ConstitucionINGLES.pdf [1 June 2009].

II
Legal framework and method

4 The international legal framework

4.1 The IMO Oil Pollution Conventions

Prior to 1967, the civil liability for oil pollution damage caused by ships was governed by national law. The applicable legislation would in general be ordinary rules of tort law, or whatever regulation governing claims in tort law against a ship or her owners.[15] Nevertheless; when the oil tanker Torrey Canyon ran aground between the Isles of Scilly and the British coast in March 1967 loaded with 121 000 tonnes of crude oil,[16] the inadequacy of tradition legal principles based on national rules and ordinary tort law became evident.[17] As the tanker was surrounded by a corporate veil and damage had been caused in both UK and France, some of the problems related to determining the jurisdiction and choice of law. The potentially applicable national legal regimes all represented diverging rules on the limitation of claims, and the problems related to choice of law extended to the question whether the owners would be entitled to limit their liability; and if so to what amount. The same problems of uncertainty arouse in relation to the scope of compensatory losses. Even though it was clear that this particular oil spill had been caused for negligent navigation for which the owners were liable, a requirement of fault could make it difficult to impose liability on other occasions.[18] This marked the start of an international cooperation on the regulation of civil liability and other financial measures in order to compensate oil pollution damage to third parties caused by ships.[19]

Today there are two international systems regulating the right to compensation for damages caused by oil spill from ships; the US Oil Pollution

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15 de la Rue (2009) p. 7, García, José Luis Gabaldón and José María Ruiz Soroa. *Manual de derecho de la navegación marítima*. 3. ed. Madrid, 2006, p. 789

16 http://www.cedre.fr/en/spill/torrey/torrey.php [1 June 2009]

17 de la Rue (2009) p. 12

18 de la Rue (2009) p. 11-12, García (2006) p. 788

19 Falkanger, Thor and Hans Jacob Bull. *Innføring i sjørett.* 6th ed., Oslo, 2004 p. 174

Act of 1990 (OPA 90),[20] and the set of Conventions developed under the auspices of the International Maritime Organization.[21] Whilst the OPA 90 applies in the US, the basic Conventions of the IMO regime cover more than 100 States worldwide.[22]

As already mentioned, the Oil Pollution Conventions consist of two sets. The first covers pollution damage caused by the discharge or escape of persistent oil from sea-going vessels constructed or adapted to carry oil in bulk as cargo[23] and consists of the Civil Liability Conventions of 1969 and 1992, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. When the Bunker Convention entered into force on 21 November 2008, the IMO regime was extended from covering oil pollution from loaded tankers to also include bunker oil from *all*[24] types of vessels. The CLC 92 and 1992 Fund Convention are both amended versions of the Conventions adopted in the wake of the Torrey Canyon incident.[25] The CLC 69 is still in force in some States,[26] but as Norway and Spain both are Contracting States to the Oil Pollution Conventions as amended,[27] these are the Conventions that will be discussed in the following.

The CLC 92 is the first tier of three[28] and imposes a strict liability for pollution damage - regardless of fault - on the owner of a ship. This liability might be excluded in an exhaustively listed number of cases related to force majeure,[29] and is also limited to an amount calculated by reference to the tonnage of the ship. In order to ensure the financing of the owner's liability, the CLC 92 imposes a system of compulsory liability insurance, and provides the

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20 For full text, see http://thomas.loc.gov/ [1 June 2009]. See also de la Rue (2009) chapter 4 and Foley, Vincent J. and Christopher R. Nolan. *The ERIKA Judgement – Environmental liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility That the Maritime Community Must Heed.* In: Tulane Maritime Law Journal Vol. 33 (2008) pp. [40-]-78, pp. 48-49

21 http://www.imo.org/Legal/mainframe.asp?topic_id=358 [1 June 2009]

22 This coverage correspond to the CLC 92 and the 1992 Fund Convention, see http://www.imo.org/Conventions/mainframe.asp?topic_id=247 [1 June 2009]

23 Art I.1 CLC 92, Art 1.2 1992 Fund Convention, Art 1.6 2003 Supplementary Fund Protocol

24 See the definition in Art 1.1 Bunkers Convention

25 See de la Rue (2009) p. 7-19 for an overview of the historic development of the Conventions.

26 As of 30 April 2009, the CLC 69 had 38 Contracting States, see http://www.imo.org/Conventions/mainframe.asp?topic_id=247 [1 June 2009] The principal difference between the original and amended version is that the CLC 92 provides for compensation up to higher limits.

27 See Chapter II6.2 and Chapter II7.2

28 See Figure 9.7.1 in Chapter IV10.7

29 Art III CLC 92

injured parties with a right to bring his claims directly against the insurer. The second and third tiers of compensation are provided by the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. These Conventions establish the two organizations jointly known as the International Oil Pollution Compensation Funds (IOPC Funds),[30] which will make supplementary funds available for claimants that have not been fully compensated by the owner and his insurer. The ordinary reason for their application tends to be that the admissible claims exceed the applicable limit of limitation under the CLC 92.[31] Claims may be presented directly to the IOPC Funds, and most claims are settled out of court.[32] The IOPC Funds are both finances by contributions levied on receivers of oil by sea transport in Contracting States.[33]

The Funds are also financed, on a voluntarily basis, by the International Group of P&I Clubs through the private agreements STOPIA 2006 and TOPIA 2006 which entered into force on 20 February 2006. These are contracts between owners of tankers and their respective P&I Club, which increases the limitation amount applicable to the tanker under the CLC 92. The effect of STOPIA 2006 is that the maximum amount payable by the owner of all ships of a tonnage of 29 548 or less is 20 million SDR, while TOPIA 2006 entitles the 2003 Supplementary Fund right to indemnification of 50% of the compensation paid to claimants. Through these agreements, the risk for oil pollution damage is more evenly distributed between ship-owning and cargo interests.[34] However, as the total amount of compensation available under the IMO regime remains the same, the Agreements do not represent any additional rights for the injured party.[35]

Though there are some important differences, the Bunkers Convention follows a pattern very similar to the CLC 92 with strict but limited liability, compulsory insurance and the injured party's right to direct action against the owner's liability insurer. Besides the fact that the Bunkers Convention applies to oil pollution damage caused by all vessels except tankers as defined in the CLC 92, the two main differences between the two Conventions is that the Bunker Convention is a single-tier compensation regime and further that it does not

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30 See Art 2.1 1992 Fund Convention, Art 2.1 2003 Supplementary Fund Protocol and de la Rue (2009) p. 137

31 de la Rue (2009) p. 81

32 See the Annual Report 2008 (IOPC Funds)

33 See Art 10 1992 Fund Convention, Art 10 2003 Supplementary Fund Protocol and the Annual Report 2008 p. 37-41

34 See *STOPIA 2006 and TOPIA 2006 Explanatory Note*, issued to the IOPC Fund by The International Group of P&I Clubs and included in the IOPC Document 92FUND/A/ES.10/13; SUPPFUND/A/ES.2/7 of 1 February 2006, Annex IV. See also Tsimplis, Dr. Michael N. *Marine pollution from shipping activities.* In: The Journal of International Maritime Law, Volume 14, Issue 2, March – April 2008, p. [101]–152 p. 122.

35 See the Annual Report 2008 p. 42-43 and the STOPIA 2006 and TOPIA 2006 Explanatory Note.

provide its own liability limits: There are no provisions for supplemental compensation above the owner's liability limit from an additional source comparable to the IOPC Funds, and the liability limit is linked to whatever national or international regime that might apply in the corresponding contracting State. The Convention itself suggests the Convention on the Limitation of Maritime Claims of 1976 as amended by the Protocol of 1996 (LLMC 76/96), and this is also the regime made applicable to liability incurred under the Bunkers Convention in Norwegian and Spanish law.[36]

4.2 Interpretation of the Conventions

The Oil Pollution Conventions may be interpreted and applied within the national context of each of the Contracting States.[37] As part of the national legislation, they will be subject to the general principles of interpretation applying in each of the States. However, the manner in which international provisions are interpreted, even within national law, will often differ from the method applied to internal, national provisions. The reason for such differential treatment reflects the attempt to establish uniform rules which is a prerequisite for any international regime that seeks to establish identical rights and obligations throughout its contracting States.

The Vienna Convention on the Law of Treaties of 1969 (VCLT), Articles 31 - 33 provides general rules on interpretations of international conventions. Spain is party to this Convention,[38] and its provisions will thus be directly applicable.[39] Even though it has not been ratified by Norway, it will be applicable as a codification of existing customary international law in accordance with the Norwegian principle of presumption.[40] Based on this, it is clear that an international convention «shall be interpreted in good faith in accordance with

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36 See Chapters II6.2 and II7.2.

37 They may also be applied by the ship owner's insurance company an the IOPC Funds in the process of assessment and compensation of claims.

38 BOE núm. 142 de 13/06/1980

39 See Chapter III8.2. See also Art 2-2 of the draft law «*Proyecto de Ley General de Navegación Marítima*»; Boletín Oficial de las Cortes Generales (BOCG), Congreso de los Diputados, parte IX Legislatura, de 19/12/2008, núm. 14-1 (PLGNM), which states that the court must be conscious of the international conventions applying within the material covered by the act, and be determined to promote uniformity through its interpretation and application. http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_014-01.PDF [1 June 2009]. This draft law is further commented in Chapter II7.2.

40 See *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports 1997 p. 7, as well as Ruud, Morten and Geir Ulfstein. *Innføring i folkerett.* 3. ed. Oslo, 2006 p. *92,* and Andenæs, Johs. and Arne Fliflet. *Statsforatningen i Norge.* 10. ed. Oslo, 2006 p. 308. See also Chapter III8.1.

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose»[41] - both in Norway and Spain. This would also follow from the fact that the actual wording is the result of a political process in which many interests are coordinated.[42]

Further guidance on interpreting the provisions of the IMO Oil Pollution Conventions can also be found within the IOPC Funds Claims Manual.[43] As the governing bodies of the IOPC Funds consists of representatives from the Contracting States, it is possible that the practice of the Fund as described in the Claims Manual might be regarded as subsequent practice or agreement between the contracting parties on the interpretation and application of their provisions, cf. Article 31.2 (a) and (b) of the VCLT.[44]

5 *Community law*

Even though the European Union provides measures within the field of maritime safety and pollution prevention, there is no particular instrument that explicitly regulates an oil pollution victim's right to compensation damage caused by ships.[45] The Member States have however undertaken to ratify the LLMC 76/96 and other relevant IMO Conventions within 1 January 2012. This means that the Member States as such will continue as individual Contracting States to the IMO Conventions. At the same time, they will establish uniformity within the EU throughout the accession of the same Conventions.[46]

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41 Art 31.1 VLCT

42 Ruud & Ulfstein (2006) p. 93

43 http://www.iopcfund.org/npdf/claimsman-en.pdf [1 June 2009]

44 de la Rue (2009) p. 368. See also Art 235.3 of the United Nations Convention of the Law of the Sea 1982 (UNCLOS) which provides for States to «co-operate in the implementation of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes (…). »

45 See the summaries of legislation on http://europa.eu/scadplus/leg/en/s13003.htm [1 June 2009], and the unpublished but adopted measures embraced by the Erika III-package on http://ec.europa.eu/transport/maritime/safety/third_maritime_safety_package_en.htm [1 June 2009]. Rules on liability is provided in Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56), but these do not apply to damage covered by the Oil Pollution Convention, see its Art 4.2 cf. Annex IV.

46 See Communication from the Commission to the European Parliament concerning the Common Position of the Council on the adoption of a Directive on the civil liability and financial guarantees of shipowners, COM(2008)846.

Through the Proposal for a Directive of the European Parliament and the Council on the civil liability and financial guarantee of shipowners,[47] the Commission aimed at harmonizing, at Community level, the regime of civil liability of ship owners and the related limits of liability, and at introducing a compulsory insurance scheme and financial guarantees for seafarers in case of abandonment.[48] However, according to the Council, specific Community rules in parallel to international rules on the same matter would result in a contradictory situation without promoting a more effective coverage of the interests of the victims.[49] The directive that finally was adopted by the Parliament on 11 March 2009 was an amended version of the Proposal called the directive on the *insurance* of ship owners for maritime claims.[50] Even though it will require all owners to maintain insurance against damage to third parties caused by their ships in respect of the applicable limits under the LLMC 76/96,[51] it does not provide the third parties with a better right to compensation in form of higher limits of liability.

Nevertheless; as a consequence of the judgment delivered by the European Court of Justice (ECJ) on 24 June 2008 as a reference for a preliminary ruling,[52] the owner of spilled oil cargo may in the future be held liable as the «previous holder» of «waste», cf. (EC) Directive 75/442 on waste.[53] This basis for liability is briefly discussed in Chapter IV10.4.2. This is a legal measure that also will be applicable in Norway due to the EEA Agreement.[54]

Besides this potential basis for liability outside the Oil Pollution Conventions, the EC Council Regulation 44/2001[55] (Brussels I Regulation) will have direct impact on the IMO regime within the area of jurisdiction, recognition and enforcement of judgments. This Regulation only applies to EU Member States, and is further discussed in Chapter IV10.8.

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47 COD (2005) 0242

48 Common Position (EC) No 29/2008 adopted by the Council on 9 December 2008 with a view to the adoption of a Directive of the European Parliament and of the Council on the insurance of shipowners for maritime claims, OJ 2008 C 330, p. 11

49 OJ 2008 C 330, p. 11

50 http://ec.europa.eu/transport/maritime/safety/third_maritime_safety_package_en.htm [1 June 2009]

51 The adopted legislative text has yet to be published in the OJ but a summary is available on http://ec.europa.eu/transport/maritime/safety/doc/2009_03_11_package_3/fiche07_en.pdf [1 June 2009].

52 Case C-188/07 Commune de Mesquer v Total France SA and Total International Ltd., [2008] ECR 4501, [2008] Lloyd's rep. 672

53 Council Directive 91/156/EEC amending Directive 75/442/EEC on waste – later partly amended by Directive 2006/12/EC on waste (OJ 1991 L 78, p. 32/ OJ 2006 L 114, p. 9), but the relevant provisions in this context remain the same.

54 The main EEA Agreement applies as Norwegian law; see Art 1 of the Norwegian EEA Act (Lov av 27. november 1992 nr. 109 (*EØS-loven*). The main Agreement includes a Chapter 3 on Environment, which comprises Directive (EC) 75/442 on waste – and Directive 2006/12/EC; see Art 74 of the EEA Agreement, cf. Annex XX.

55 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1)

6 *The Norwegian legal framework*

6.1 An introduction to Norwegian legal method

The question of legal method reflects the scope of sources on which the solution of legal problems may be based, as well as the process of their interpretation and application to a specific legal problem.

Even though most legal areas within Norwegian law are statutory regulated - at least to a certain extent,[56] the provisions will often have a wording designed to cover many different cases, and thus be of a general or vague character. Another thing is that the text may be ambiguous and difficult to apply in a specific case without being coordinated with other legal sources. Within Norwegian law there is no exhaustive list of applicable legal sources, nor any statutory principles on their interpretation and application. One might however separate between the principal legal sources applying directly as legal basis for the solution of a legal problem, sources like a statutory act or non-statutory principles on tort law evolved through case law; and the legal sources from which arguments are extracted in order to interpret an unclear, principal legal source.[57]

An illustrating example can be found in the judgment «Tsesis».[58] Even though it was delivered by the Swedish and not the Norwegian Supreme Court, it is still representative for the Norwegian legal method of interpretation within civil law because of the Nordic legal cooperation within this field.[59] The case concerned a Soviet tanker which hit an unmarked, submerged rock in Swedish waters on 26 October 1977. Her bottom was damaged by the impact, and about 600 tonnes of heavy fuel oil escaped the ship and caused extensive pollution damage.[60] The Swedish State claimed the Soviet owners for compensation, but these argued that they were to be exonerated from liability by virtue of the

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56 Principles of general tort law are developed through case law and are only to a certain extent made statutory; see the Act relating to compensation in certain circumstances (Act of 13 June 1969 No. 26, Skadeserstatningsloven/ SKL).

57 Eckhoff, Thorstein and Jan E. Helgesen. *Rettskildelære*. 5. ed, Oslo, 2001 p. 20 and 23. The term «source of law» might be slightly misleading, as the term applied by Eckhoff & Helgesen is «rettskildefaktor», which reflects that neither of the sources provides complete solutions, but material for further reasoning and considerations, see p. 23

58 Nordiske Domme i Sjøfartsanliggender ND-1983-1/ Swedish Supreme Court NJA 1983-1

59 See the Art 4 of the Treaty of Cooperation between Denmark, Finland, Iceland, Norway and Sweden 1962 (The Helsinki Treaty); «The High Contracting Parties shall continue their cooperation in the field of law with the aim of attaining the greatest possible uniformity in the field of private law». See also Falkanger & Bull (2004) p. 4.

60 ND 1983 p. 1, p. 1

Swedish act implementing the CLC 69, and especially because the ship only ran aground and consequently caused the damage because of the negligence of the Swedish Government in respect of the maintenance of «other navigational aids», cf. Article III.2(c).[61] The Court found that it was negligent of the Government not to mark the shoal on the chart, and the question was whether a marine chart qualified as a «navigational aid» within the meaning of the Convention.[62] In their interpretation, the Court did not only seek arguments from the wording of the Swedish implementing provision, its legislative context and the national preparatory works, but also from the original text of the convention, and its preparatory works.[63] Besides, since the provision was a result of an English proposal, it was also sought interpreted in the light of legal English, their legislative method and particular English principles of interpretation as discussed in domestic legal literature and by the national courts.[64] However, as the English legal theory and case law rendered the conditions and scope of application of the principle in question unclear (*the ejusdem generis rule*), and it also lacked an equivalent in continental law, the Court found that the this interpretation would not be valued as a very important argument in the process of clarifying the extent of the Swedish provision in this particular matter.[65] In the following, the Court resorted to the natural understanding of the term «navigational aid» which they considered to include marine charts – and ended up with this as a final conclusion because of the importance of the wording, and the fact that such an interpretation was found to be in accordance with the with the purpose of the provision as such, and with the convention as a whole. In the preceding process of clarifying the relationship between such an interpretation and the purpose, the Court sought for arguments in the international preparatory works, in statements from the people participating in the drafting of the CLC, in the position taken in the Norwegian preparatory works and in general policy considerations.[66]

This example shows that a wide range of different sources might be considered relevant for the interpretation of a provision; be it national, foreign, international, statutory or non-statutory. It also illustrates that the decisive aspect lies in the final weighing of the relevant sources respective importance,

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61 ND 1983 p. 1, p. 1

62 ibid. p. 19

63 ibid. p. 20

64 ibid. p. 22-23

65 ibid. p. 24-25

66 ibid. p. 25-26

or «weight».[67] This aspect depends on the underlying principles of interpretation developed through case law – and the other types of legal sources providing guidance on the particular problem in question.[68]

As described under Chapter II4.2, particular consideration applies to the interpretation and application of incorporated international law. The referred «Tsesis» judgment gives an example of the scope of legal sources that might be relevant their interpretation, and the relationship between Norwegian law and international law – denominated by the term *dualism* – is further discussed under Chapter III8.1.

6.2 The Norwegian framework on an injured party's right to compensation for oil pollution damage caused by ships

The principle legislation within the field of maritime law is assembled in the Norwegian Maritime Act of 1994 (NMC).[69] Because of the international cooperation within the area of shipping, the content and structure of the Act is to a great extent shaped after ratified international conventions. The Act can also be described as a Nordic project, as it has been developed in cooperation with other Scandinavian countries as part of the referred Nordic legal cooperation.[70]

The Oil Pollution Conventions are all enacted into Norwegian law through Chapter 10 NMC. Part I[71] covers the implementation of the Bunkers Convention and part II[72] of the CLC 92. The 1992 Fund Convention and the 2003 Supplementary Fund Protocol are also enacted through Chapter 10 Part II, but apart from a few provisions,[73] they are incorporated by referral in Section 201 NMC (Chapter 10, part II).[74] The link between the implemented Bunkers Convention and the limits pursuant to the LLMC 76/96 as the selected[75] regime on the global limitation of claims for compensation for bunker

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67 Eckhoff (2001) p. 22-30, see also Boe, Erik. *Grunnleggende juridisk metode. En introduksjon til rett og rettstenkning.* Oslo, 2005, p. 84-85.

68 This topic is thoroughly discussed in Eckhoff (2001).

69 Lov om sjøfarten (sjøloven) av 24. juni 1994 nr. 39

70 Falkanger & Bull (2004) p. 4; see also footnote 59

71 Sections 183 – 190 NMC

72 Sections 191 – 209 NMC

73 See Section 202 NMC on oil receivers' duty to contribute to the IOPC Funds and Section 204 NMC on the jurisdiction of Norwegian courts in civil action against the IOPC Funds.

74 The reason for applying different methods of incorporation is discussed in Chapter III8.1.

75 Art 6 Bunkers Convention

oil pollution damage resulting from the same incident is established through Section 185.2 NMC. This provision states that Chapter 9 NMC; through which the substantial rules of the LLMC 76/96 are implemented, shall apply in regards of the limitation of the ship owner's liability.

General rules on civil liability for pollution damage can also be found in Chapter 8 of the Norwegian Pollution Control Act 1981 (NPCA). Even if this Act in principle is applicable to oil spill pollution damage, Section 53 NPCA states that it will lack applicability whenever there are other, particular rules regulating the pollution liability (lex specialis). This is the case with most of the components within the question of compensation for oil pollution damage caused by ships, as Chapter 10 NMC regulate which is the liable subject, the liability,[76] its limitation and the channelling of liability. However, the question of the damage or interests subject to compensation after a spill is not thoroughly regulated in the NMC and might be supplied by Sections 57 and 58 NPCA.[77]

In regard of the regulation of the liability for oil pollution damage outside the scope of the incorporated Oil Pollution Conventions, the Norwegian legislator has opted for an extension of the international measures so that they apply as internal legislation. As a result, general principles of tort law will only supplement the interpretation of the statutory provisions regulating the civil liability for oil pollution damage caused by ships.[78]

7 The Spanish legal framework

7.1 An introduction to the legal method applicable in Spain

Spanish law is principally supported by statutory law in a broad sense (codes, laws and other regulations) and to a lesser extent by judicial decisions and customs. In contrast to the Norwegian, unlimited material of legal sources, the

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[76] By referral to Chapter 9 in regards of claims subject to the implemented Bunkers Convention, see Section 185.2 NMC

[77] Falkanger & Bull (2004) p. 178. See Chapter IV10.2.

[78] See however the discussion in Chapter IV10.4.2 on the vicarious State liability pursuant to Section 2.1 SKL as a potential base of liability outside the CLC 92 and the Bunkers Convention.

Spanish sources of law are exhaustively listed in the Article 1.1 of the Civil Code (CC)[79]. The included sources consist of law as a written rule created by the State, custom rules, and general principles of law.[80] The definition law as a written rule does not only embrace rules created by the State's legislative power, but also rules created by the Government and the Public Administration in the exercise of their executive power. «*Ley*, thus, is any written rule of law created by the State. »[81]

Case law is not listed in the Article 1.1 CC, and is not formally considered to be an ordinary source of law. However, according to Article 1.6 CC, any decision containing principles established by the Spanish Supreme Court in relation to the interpretation and application of the ordinary body of laws, custom rules and general principles of law will be a complementary source of law. This means that in contrast to the sources included in the Article 1.1 CC, case law does not create law, but establish norms of interpretation.[82] These legal solutions affirmed throughout a number of judgments are called *doctrina jurisprudencial*.[83] Even though the CC has not given these principles a central position within the sources of law, they still have gained an important position within practical Spanish legal method.[84]

Just as the Art 1 CC list the applicable sources of law, some general principles on their interpretation and application are also found within the first Chapter of the Code. The central principal is that all legal provisions must be interpreted according to the normal understanding of its wording, within the context, the legislative history and the social reality of the time in which it is to be applied.[85] Even though the Spanish legal method formally has a more restrictive definition

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79 Código Civil de 24 de julio 1889. BOE núm. 206 de 25/07/1889.

80 The CC itself is considered to be a subsidiary source of law, see Art 4.2 CC and Merino-Blanco (2006) p. 3.

81 Merino-Blanco, Elena. *Spanish Law and Legal System*. 2. ed. Sweet & Maxwell, London 2006, pp. 31 – 32. For an English explanation of the various types of law, see Merino-Blanco (2006) pp. 32 – 42.

82 There is an ongoing discussion in Spain on whether or not case law can be regarded as a source of law. See for instance Benítez, Óscar Daniel Ludeña. *El valor vinculante de la jurisprudencia antes y después de la Ley 1/2000, de Enjuiciamiento Civil*. In: Noticias Jurídicos/ Artículos Doctrinales: Derecho Procesal Civil (online) with further references on http://noticias.juridicas.com/articulos/60-Derecho%20Procesal%20Civil/200201-75572901022280.html [1 June 2009]

83 Nieto García, Alejandro. *Valor Legal y Alcance Real de la Jurisprudencia*. In: Teoría y realidad constitucional. Madrid, núm. 8-9, 2001-2002, p. 103-116; p. 104. http://www.juridicas.unam.mx/publica/librev/rev/trcons/cont/8/art/art5.pdf [1 June 2009]]

84 Arroyo Ignacio. *Curso de derecho marítimo*. 2. ed. Madrid, 2005, p. 65, Nieto García (2001) p. 110-111

85 Art 3.1 CC

of legal sources than the Norwegian method, this principle indicates that the process of interpretation might be quite similar in both States. Even though a preparatory work will not be considered as a source of law, a statement provided in such a document might have effect on the final interpretation of the actual source of law as part of its legislative history. Another example of this resemblance between the systems is that the Spanish legal method, in contrary to the Norwegian, does not denominate policy considerations as a source of law. Article 3.2 does however provide for a principle of interpretation called «equidad», which refers to the justice of the case. This principle will only apply to the interpretation performed by a court, and implies that it must adapt the rule of law to the circumstances of the actual case.[86] The application of this type of policy considerations even seems to go further than in Norwegian law, as the principle also refers to a potential mitigation of the consequences of the rule of law in a particular case.[87] Other examples on the resemblance of the Norwegian and Spanish legal method are the principles on the collision of rules which are commented on in Chapter III9.

Another aspect of the Spanish legal method is the impact of Community law, and the division of legislative and executive competence is between the Central Public Authorities and independent areas called Autonomous Communities.[88] The latter division is of no current interest to the topic of this thesis, while the impact of Community law on the interpretation and application of the Oil Pollution Conventions will be discussed in relation to the topics mentioned in Chapter II5.

The relationship between Spanish law and international law which is characterized as a system of monism will be discussed in chapter III8.2.

7.2 The Spanish framework on an injured party's right to compensation for oil pollution damage caused by ships

Even though maritime trade has been important to the Spanish community for centuries, maritime law is not a legislative autonomous legal area, and the applicable legislation is spread out in many different acts of law. Because of the commercial aspect of maritime law, the core legislation is still found in the

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86 See Merino-Blanco (2006) p. 54-55

87 Merino-Blanco (2006) p. 54-55

88 Art 2 CE and Arts 143 – 158 CE («De las Comunidades Autónomas»). See Vaquer, Antoni. *Spain*. In: Elgar Encyclopaedia of Comparative Law/ edited by Jan M. Smits. Cheltenham; Edward Elgar Publishing 2006, p. [672]-676, p. 672 – 673.

Commercial Code, promulgated in 1885.[89] Other applicable provisions are found within the classical legal disciplines civil, administrative and criminal law.[90] Because of the extent international cooperation within maritime law, a great part of the corresponding legislation consists of incorporated international conventions.[91] The current legislative situation has however been subject to revision,[92] and the draft law will be commented upon below.

The Spanish legal system follows a monistic approach to international conventions, and the CLC 92,[93] the 1992 Fund Convention,[94] the 2003 Supplementary Fund Protocol,[95] the Bunkers Convention,[96] and the LLMC 76/96[97] have all been incorporated throughout their publication in the official State gazette *Boletín Oficial del Estado* (BOE).[98] It is the conventions as such that form part of the national legislation, and their provisions will be of direct application. This is possible because Spanish is one of the authentic languages in which the IMO Conventions are drafted.[99] When international provisions have been enacted in the Spanish legislation through their publication, the self-executing rules will create rights and obligations which can be invoked by all natural and legal persons. Some provisions may however lack a character suitable for direct application, and will thus require further legal elaboration. This task usually[100] corresponds to the Parliament as State Legislator, and the supplementary provisions will usually be adopted in a *Real Decreto*; a Royal

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89 Código de Comercio de 22 de agosto de 1885, BOE núm. 289 de 29/12/1978. The text is based on the Commercial Code of 1829. The main difference between the Codes is the adoption of means suitable for ships driven by steam, not sails.

90 Fontestad, Portalés, Leticia. *El transporte marítimo de mercancias y sus incidencias procesales.* Doctorate thesis, directed by Juan Antonio Robles Garzón. Universidad de Málaga, España, 2004, http://www.sci.uma.es/bbldoc/tesisuma/16698836.pdf [1 June 2009] p. 461

91 For a detailed overview of the legislative situation in Spanish maritime, law, see Arroyo (2005) p. 85-102

92 «*Proyecto de Ley General de Navegación Marítima*» (PLGNM)

93 BOE núm. 225 de 20/09/1995

94 BOE núm. 244 de 11/10/1997

95 BOE núm. 28 de 02/02/2005

96 BOE núm, 43 de 19/02/2008

97 BOE núm. 50 de 28/02/2005

98 This process if further discussed in Chapter III8.2.

99 See for instance Art 18 of the 1992 Protocol to the CLC 69, Art XXI CLC 69, Art 19 Bunkers Convention, Art 23 LLMC 76 and Art 15 LLMC 96.

100 If the material in question affects the constitutional competence of the Autonomous Communities, cf. Art 148 CE, the further elaboration will be carried out by the autonomous legislator, see Díez de Velasco Vallejo, Manuel. *Instituciones de Derecho Internacional Público.* 16. ed., Madrid, 2007, p. 254.

decree. One example is the R.D. 1795/2008[101], through which the Government establishes norms of the handling and control of certificates attesting that insurance or other financial security is in force in accordance with Art 7 of the Bunkers Convention. A similar decree was adopted in relation to the CLC 92 which also demands the use of such certificates.[102]

As of today, there is no particular Spanish regulation regarding the liability for damage caused by maritime accidents.[103] Any liability for damage falling outside the scope of the Oil Pollution Conventions, will be subject to provisions of a general character, such as the general rule of fault within tort law,[104] civil liability deriving from a criminal offence,[105] and the rules on the strict liability of the Spanish Public Authorities for the wrongful functioning of public services.[106] According to Article 139 LRJAP, all individuals have a right to compensation for damage suffered in relation to their property or rights, whenever such damage is the *result* of the operation of public services and not of force majeure. This particular rule on the State's strict liability will be commented upon and compared to the corresponding Norwegian rule on vicarious State liability in Chapter IV10.4.3.

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101 R.D. 1795/2008, de 3 de noviembre, por el que se dictan normas sobre la cobertura de la responsabilidad civil por daños causados por la contaminación de los hidrocarburos para combustible de los buques. BOE núm. 278 de 18/11/2008

102 CLC 92 Art VII, and Real Decreto 1892/2004, de 10 de septiembre, por el que se dictan normas para la ejecución del Convenio Internacional sobre la responsabilidad civil derivada de daños debidos a la contaminación de las aguas del mar por hidrocarburos. This R.D. has later been amended in order to correspond better to the rules of R.D. 1795/2008, see the R.D. 1795/2008, first final disposition.

103 Castro Rey, Consuelo. *El Derecho marítimo y los sistemas compensatorios: a propósito del Prestige.* Discurso para las 1as primeras Jornadas Científicos-Técnicas de lucha contra la contaminación marítima, 26 – 27 de octubre, 2006 (Galicia). http://www.mpr.es/NR/rdonlyres/8FAC325B-CD71-4283-8795-CBAE34A7BC81/81466/JavierSu%C3%A1rezElDerechomar%C3%ADtimoylossistemascompensat.pdf [1 June 2009] p. 3

104 Art 1902 CC: «Whoever causes damage to another with fault or negligence is obliged to repair the damage caused»; translation taken from Merino-Blanco (2006) p. 251.

105 Arts 119 -121 CP; see also Chapter IV10.3.1

106 Art 139 et seq of Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (LRJAP); BOE núm. 285 de 27/11/1992. See also Pulido, Juan L. *Compensation by the Coast States – The Prestige Disaster.* In: Prevention and Compensation, edited by Basedow/ Magnus, in series: Hamburg studies on maritime affairs vol. 10, Berlin 2007, p. [151]–169, p. 164 and Coderch, Pablo Salvador … [et al.]. El Derecho Español de Daños en 2005: Características Diferenciales. In: Global Jurist Topics, Volume 6/1 2006 (online). Published by The Berkeley Electronic Press. http://www.bepress.com/gj/topics/ [1 June 2009] p. 1 [Coderch (2006) B]. This basis of liability is discussed in Chapter IV10.4.2.

7.3 Preparations for a Spanish Maritime Code

The entire Spanish body of legislation related to maritime law has been subject to revision for the past years, and on 19 December 2008, the Congress approved on a Draft Law for a General Spanish Maritime Code (PLGNM). Since then, it has been awaiting the reading and potential amendments of the Senate.[107]

If adopted, the new Maritime Code will gather and update the Spanish legislation within maritime law.[108] In contrast to the national, maritime legislation which will be fully implemented in the new Code, any ratified Convention will continue to be an individual source of law. The situation with a multitude of sources might however improve if the majority of the supplementary, national sources are found in one single act.

The main features of the PLGNM within the scope of civil liability for pollution damage is that the concept of the CLC 92 in respect of strict liability,[109] mandatory insurance and the right of direct action against the insurer[110] is extended to a wide range of different types of marine pollution caused by ships and other maritime constructions.[111] The scope of compensatory damage is however defined in accordance with the CLC 92.[112] As these provisions only aim to *supply* the Oil Pollution Conventions[113] the Code will not have any direct effect of their interpretation and application. However, in regard of oil pollution damage outside their scope of application,[114] these provisions will provide a similar regime as the one applicable under Norwegian law.

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107 The closing date has been extended on a weekly basis since February 2009, and is currently 2. June 2009, see BOCG, Congreso de los Diputados, seria A Proyectos de ley, de 27/05/2009, núm. 14-16.

108 Preliminary Recitals (PLGNM) p. 3

109 Art 415 PLGNM

110 Art 418 PLGNM

111 Art 413 cf. 62 PLGNM

112 Art 417 PLGNM

113 Art 420.1 PLGNM. The provisions will also supply the International convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea of 1996 (HNS) which is not yet in force.

114 See Chapter IV10.1

III
International and national law

International conventions can be said to possess a double legal dimension. This is reflected in the fact that they for one oblige a Contracting State to comply with the agreed material in relation to other contracting States, and secondly by the circumstance that these States will need to enact any ratified convention in their national legislation in order to fulfil their international duty. The execution of this latter dimension is governed by internal rules, and can cause divergence between Contracting States in terms of methodical aspects related to the interpretation and application of international provisions. In the following I will discuss the national methods applied when ratified international conventions are converted into National and Spanish law and later coordinated with internal provisions.

8 The national approach to international law

8.1 Norwegian law and international law: dualism

The Norwegian approach to the implementation of international conventions is based on duality between national and international law. This means that Norwegian law and international law in principle are two separate legal systems.[115] Even if the *State* is legally bound by its ratification of a convention, the provisions do not automatically govern Norwegian natural or legal persons. If a national norm should be divergent from a provision in a ratified but not implemented international treaty, the starting point is that the national rule will be given precedence over the international rule. The content of the conventions will have to be implemented through national law by Norwegian legislators in order to obtain the same status as the rest of the national legal acts.

[115] Andenæs (2006) p. 31, Ruud & Ulfstein (2006), NOU 1972:16 *Gjennomføring av lovkonvensjoner I norsk rett* p. 32, Rt-2007-234 paragraph (54), cf. Rt-2000-1811 «Finanger I», Rt-2000-996 «Bøhler» p. 2006 and Rt-1997-580 «OFS»

The impact of this starting point is however diminished by the principle of presumption, which is developed through case law and implies that Norwegian legislation is presumed to be in accordance with international law.[116]

If the application of a Norwegian provision interpreted in accordance with its wording should result in divergence with applicable international law, the court will apply a restrictive interpretation of the internal provision so that the final application is in accordance with the corresponding international law.[117] This method does however presuppose that the provision can be interpreted in different ways, and that the legislator has not intended for the internal rule to diverge from the international.[118]

The impact of this principle on national legislation will further depend on the international provision and of the legal area to which the national rule belongs. Generally it can be said that the Norwegian rule will be considered to have little impact if it collides with an international obligation protecting citizens from the intervention of the State, while the impact of the national rule will be quite strong if the international obligation intervene in the legal relationships of private parties.[119]

However, these problems of interpretation are easily avoided by enacting the international provisions in the Norwegian system through the decision of a competent body of the State. This task is usually completed by the legislative body; the Parliament. Two of the most applied methods of implementation consist of either to include the substantial content of the national convention in a national act of law (transformation/ implementation), or by stating, within the wording of a national law, that the international treaty shall be applicable as Norwegian law (incorporation). A third method is called «sector monism», which means that a national act will be subject to the limitations recognised in international law, or to limitations deriving from an agreement made with a

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116 See Ruud & Ulfstein (2006) Chapter 5, and Fleischer, Carl August. *Folkerett.* 8. ed. Oslo, 2005, p. 360. The principle of presumption has traditionally only included general international law, and not ratified but not incorporated treaties. It is disputed whether the principle of presumption can justify an interpretation in conformance with ratified but not enacted international law, see Fleischer (2005) p. 361, Andenæs (2006) p. 32 and Ot.prp.nr.79 (1991-1992) Om lov om endringer i lov 20. juli 1893 nr. 1 om sjøfarten mm., p. 3. Nevertheless; based on the wide understanding of relevant sources of law within the Norwegian legal method, a court might place emphasis on the existing international obligation when interpreting an internal provision - without resorting to the principle of presumption.

117 Ot.prp.nr.79 (1991-1992) p. 3

118 Mestad, Ola. *Rettens kilder og anvendelse.* In: Knophs oversikt over Norges rett, 13th ed., Oslo 2009 p. 22, Ruud & Ulfstein (2006) p. 64, Eckhoff (2001) p. 317, see also Rt-2000-1811 «Finanger I» p. 1831, paragraph 7

119 See Rt-2000-1811, p. 1829

foreign State.[120] This method is not applied in the incorporation of any of the Oil Pollution Conventions, and will not be further discussed.

An example of active transformation is the implementation of the Bunkers Convention and the CLC 92 into the NMC Chapter 10 parts I and II respectively. The international provisions establishing rights or obligations are reproduced in Norwegian, and adapted to fit in with the rest of the NMC. In contrast, notwithstanding that some of the provisions under the Funds Conventions are separately implemented in Chapter 10.II NMC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol are incorporated through referral in Section 201 NMC. The provision reads:

> «In addition to the damages an injured party can obtain [from the owner/insurer], he or she is entitled to damages according to the provisions of the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. Both the 1992 Fund Convention and the 2003 Supplementary Fund Protocol have statutory force. »

When the CLC 69 and 1971 Fund Convention were enacted in Norwegian law, the decision to implement the first and incorporate the latter was justified by the nature of the respective Conventions, see NOU 1973:46 p. 16. One of the principal reasons for which the CLC 69 was implemented, was that its provisions would be of interest to all potential injured parties as well as the liable persons, and secondly that some of the rules under the Convention could be hard to comprehend in its original form. Another objective was to facilitate the extension of some of the international provisions.[121] As for the 1971 Fund Convention, it was upheld that its provisions would only apply on very few occasions. Another argument for incorporating this Convention by reference was that many of its provisions governed the rights and obligations of the 1971 IOPC, and consequently had little impact on the national level. The few provisions that were implemented, related to the oil receivers' contribution to the Fund, as well as rules on jurisdiction.[122] The same considerations apply today.

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120 Section 4 of the Norwegian Criminal Procedures Act and Section 1-2 of the Norwegian Dispite Act are examples of provisions establishing sector monism. These internal acts are among other things influenced by incorporated human rights conventions and the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1988 (Lugano Convention)

121 See Chapter IV10.1

122 See Sections 278 and 280 of the Maritime Act of 1893, annulled by the entry in force of the NMC and the current Sections 202 and 204 NMC.

8.2 Spanish law and international law: monism

The relationship between Spanish, internal law and international law follows the monistic system. In contrast to the Norwegian system, the Spanish Constitution has made this approach statutory. Article 96.1 CE reads:

«Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. (…)»

The wording of this provision implies that no further action from the national legislator or from any other body of the State is required in order to confer binding force on an international agreement.[123] When the State has ratified a bi- or multilateral convention, it is in principle applicable on the same level as other national law. However, it is a requirement that the ratified convention must be «officially published». The same condition is repeated in Article 1.5 CC, through the statement that no legal rules provided in an international treaty will be of direct application in Spain before it has been «integrally published»[124] in BOE. The act of publication corresponds to the Ministry of Foreign Affairs and Cooperation.[125] Based on this, one could characterize the Spanish system as moderately monistic.[126]

When international provisions have been enacted in the Spanish legislation through their publication, the self-executing rules will create rights and obligations which can be invoked by all natural and legal persons. Some provisions may however lack a character suitable for direct application, and will thus require further legal elaboration.[127] This task usually[128] corresponds to the Parliament as State Legislator.[129]

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123 Merino-Blanco p. 34

124 Meaning that it is not only the text of the conventions that must be published, but also the instrument of adhesion and all other annexes or documents related to the treaty, cf. Decreto 801/1972, de 24/03, sobre ordenación de la actividad de la Administración del Estado en materia de Tratados Internacionales, BOE núm. 85 de 08/04/1972.

125 See Decreto 801/1972 and Real Decreto 1124/2008, de 4 de julio, por el que se desarrolla la estructura orgánica básica del Ministerio de Asuntos Exteriores y de Cooperación, BOE núm. 165 de 09/07/2008.

126 Díez de Velasco (20007) p. 246

127 See examples under Chapter II7.2

128 If the material in question affects the constitutional competence of the Autonomous Communities, cf. Art 148 CE, the further elaboration will be carried out by the autonomous legislator, see Díez de Velasco (2007) p. 254.

129 Whenever the competence lies with the Parliament, they have a general constitutional right to «delegate to the Government the power to issue rules with the force of an act of the Parliament on specific matters (…) », cf. Art 82.1 CE. The only exception is the material that need to be adopted in a *Ley orgánica*, which covers «the implementation of fundamental rights and public freedoms, those approving the Statutes of Autonomy and

8.3 Does the dualist and monist approach as such represent any substantial difference between the regimes?

The different methods applied as a consequence of Spanish monism and Norwegian dualism results in international conventions being directly applicable as Spanish law following their publication in BOE, while the corresponding Norwegian source will consist of either the Convention as incorporated by referral, or national provisions rendering the content of the Conventions through the method of implementation. When the different methods of incorporation are seen in connection with the seemingly adversative systems of monism and dualism, it might be reasonably to assume that the two systems represent clear differences. In my opinion it is however the applicable national legal method and other substantial rules of law - not the systems of monism or dualism, that ultimately might result in a divergent interpretation of the same international provision.[130]

The clear difference between the Spanish direct application and the Norwegian incorporation lies in the Spanish incorporation being carried out through the Government's publication of the Convention and the Norwegian dualism's requirement of the convention being enacted by the Parliament as legislator. This results in the direct applicability of the convention in Spain, while a Norwegian court would have to go by way of the internal incorporating provision.[131] Nevertheless; as this connecting link between national law and international law usually will lack substantial content other than providing for the incorporation, the final result will be that a court in both Norway and Spain would resolve directly to the convention as such.[132] At the same time, the convention will constitute a national source of law in both States, and may thus be subject to the national legal method when it comes to interpreting unclear provisions. However, even though the Norwegian legal method prescribes an interpretation based on an unlimited range of relevant sources, the court will probably be conscious of the international nature of the rules and thus apply an interpretation in accordance with the Vienna Convention on the Law of Treaties of 1969 (VCLT), Articles 31 – 33. Even though this international

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the general electoral system and other laws provided for in the Constitution.», cf. Art 81.1 CE

130 See also NOU 1972:16 p. 16

131 Such as Section 201 NMC which incorporates the CLC 92 and the 2003 Supplementary Fund Protocol.

132 NOU 1972:16 p. 63

Instrument has not been ratified by Norway, it will be applicable as a codification of existing customary international law in accordance with the principle of presumption.[133] Spain is a Contracting Party to the VCLT,[134] and the particular rules on the interpretation of international conventions are directly applicable.[135]

It is likely that the same type of interpretation will be applied to provisions enacted in Norwegian law through the method of implementation. The principal reason for why the interpretation should not correspond to the international regime is that the emphasis of the provisions as international measures might disappear when they are integrated within the context of internal provisions regulating the same material. However, unless the implementing provision provides otherwise, there is no reason for why a Norwegian court should not apply an interpretation in accordance with international general principles. A factor that might affect the interpretation is that the international provision will be interpreted in accordance with the context in which it is implemented. Still, this is not a consequence of the system of dualism, as the Spanish legislator also may have adopted measures that affect the interpretation of an international convention. The impact of the internal legislation is a topic that will be discussed in relation to the Oil Pollution Conventions in Part IV, and must be kept separate from the effects caused by the system of monism and dualism as such.

Even though courts in both Norway and Spain will seek to apply an interpretation of enacted international provisions that support a uniform application of the international regime, the final result may in theory be affected by the hierarchical position of the incorporated provision within the national legislation. This aspect is not a result of monism or dualism, but of general national principles on the collision of rules, and will be discussed below.

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133 See *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports 1997 p. 7, as well as Ruud & Ulfstein (2006) p. *92,* Andenæs (2006) p. 308 and NOU 1972:16 p. 63. See also Chapter II4.2.

134 BOE núm. 142 de 13/06/1980

135 See also the Art 2-2 of the draft law *Proyecto de Ley General de la Navegación Marítima*, which states that the court must be conscious of the international conventions applying within the material covered by the act, and be determined to promote uniformity through its interpretation and application.

9 *International provisions in a national context*

The existence of both internal and incorporated international provisions within a national legal system might create situations in which a legal problem seems to be governed by two different sets of rules. [136] In such a case, the applicable provisions must be interpreted in accordance with internal principles on the coordination of international provisions within national law. As incorporated international provisions form part of the national law, these principles will to a certain extent be the same that applies to other national legislation. However, the nature of international conventions as a tool applied to coordinate the rights and obligations within certain legal areas call for particular measures to protect the uniformity from national degrading. In this Chapter, I will look at the level of protection provided by the Norwegian and Spanish legal system. The discussion will relate to the stage by which it is clear that the national and the incorporated provisions cannot be interpreted in accordance with one another; a situation referred as «total inconsistency» in Norwegian legal literature.[137] This term refers to two or more inconsistent provisions governing exactly the same legal problem so that neither of them can be subject to a restrictive interpretation.

In order to decide which of the two provisions that shall prevail and thus apply to the legal problem in question, both the Norwegian and the Spanish court will apply the principles of *lex superior, lex posterior and lex specialis*.[138] These are all non-statutory guidelines under Norwegian law, while the principle of lex superior and lex posterior have been made statutory through the Spanish Civil Code.[139] The principle of lex specialis has been established as a part of the Spanish legal method through the case law of the Supreme Court.[140] As mentioned in Chapter II7.1, case law may establish norms of interpretation even though it does not constitute a source of law.[141]

According to the principle of lex posterior, new legislation will be given supremacy over an older regulating the same material. This starting point is

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136 This situation differs from the situation in which Norwegian law is sought to be interpreted in accordance with non-incorporated international law.

137 Eckhoff (2001) p. 346

138 See Eckhoff (2001) p. 343 and Boe (2005) p. 170

139 See Art 1.1 (Lex superior) and Art 2.2 (Lex posterior)

140 Tardío Pato, José Antonio. *El principio de especialidad normativa (lex specialis) y sus aplicaciones jurisprudenciales*. In: Revista de administración pública No. 162, 2003, p. [189] – 225. http://www.cepc.es/rap/Publicaciones/Revistas/1/2003_162_189.pdf [1 June 2009] p. 189. See for instance STS 28/02/2001.

141 Art 1.1 cf. Art 1.6 CC

amended by the principle of lex superior which implies that the new provision only will be able to derogate from the already existing one if it has been adopted by the same or higher authority and therefore possess the same or higher hierarchical status as the old act. A situation like this will normally be the case with ordinary acts of law adopted by the Parliament. Due to the principle of lex specialis, a new provision of the same or higher hierarchical status may however be prevented from derogating from an existing provision if the older provides regulation on a particular material, while the more recent one is of a general nature.[142]

Pursuant to the principle of lex superior, the provision with the highest hierarchical status will prevail if the same legal material is governed by two provisions of different status. This means that an incorporated provision can be protected from later amendments by internal law if the legislator provides it with a higher hierarchical status.

Under Norwegian law, the enacted, international provisions will obtain the same hierarchical position as the legal source through which it is transformed or incorporated.[143] The implementing provision will normally be an ordinary act of law, even though an international obligation of the State theoretically may be enacted through a norm of lower or higher hierarchical status.[144] It would also have been possible to implement a convention on a constitutional level, but this would require the cumbersome procedure of amending the Constitution.[145]

Nevertheless, in relation to the incorporation of some international measures, the Norwegian legislator has Stated that these shall supersede ordinary legislation in case of divergence. This special rule applies to the incorporated Human Rights Conventions listed in Section 2 of the Norwegian Human Rights

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142 Section 53 NPCS expresses the principle of lex specialis by stating that the rules on liability in Chapter 8 NPCS only will apply if no other legislation or contracts regulate the question of liability for environmental damage. The incorporated provisions of the CLC 92 and the Bunkers Convention in Chapter 10 NMC is therefore given precedence, see Chapter II6.2. Even though the *Norwegian Pollution Control Act* was adopted in 1981 and thus would not prevail the incorporated provisions of CLC 92 and the Bunkers Convention based on a interpretation in accordance with the principle of lex posterior, the precursory CLC 69 was implemented and in force at the time the NPCA was adopted. As a result, this can still apply as an illustrative example of the coherence between the principles of lex superior and lex posterior.

143 Eckhoff (2001) p. 310

144 See NOU 1972:16 p. 35

145 Section 112 NC. See also Section 110 c, which in general terms instructs the State to respect and secure human rights, but at the same time states that the implementation of human rights conventions must be carried out through an ordinary act of law.

Act,[146] and provisions adopted to fulfil Norway's obligation under the EEA Agreement.[147]

Even though this special rule does not apply to the Oil Pollution Conventions at the moment, one could ask what the situation would have been if the EU as an organ could and did become a contracting party to these Conventions. Would such an action cause the implemented provisions to gain supremacy over ordinary Norwegian legislation based on their nature as norms fulfilling Norway's obligations under the EEA Agreement?[148] The answer relies on whether the content of the conventions can be said to form part of the main EEA Agreement, cf. Art 1 of the Norwegian EEA Act. The main Agreement includes a Chapter 3 on Environment, which embraces the "polluter pay" principle, and already embraces Directive (EC) 75/442 on waste – which might apply as legal basis for imposing liability on an oil cargo owner for oil pollution liability caused by the ship carrying the oil; see Article 74 of the EEA Agreement, cf. Annex XX. On this background, it is not unlikely that the implemented provisions the Oil Pollution Conventions would become part of the Agreement, and thus gain supremacy over ordinary, internal legislation. Likewise could one wonder whether an EEA relevant convention incorporated by reference also would have been given higher status than an ordinary act of law - even though no additional provisions had been adopted in order to fulfil Norway's obligation under the Conventions. These problems are highly theoretical, and are only meant to illustrate some of the implications that would have been caused on matters of legal technique if the EU as such was to become a Contracting Party to the Oil Pollution Conventions.

As long as an international convention is not implemented into the Norwegian legislation on a constitutional level, Norwegian courts are entitled to perform a constitutional review in order to declare if the content of the incorporated international provisions contradicts the Constitution.[149] This is a constitutional practise, affirmed through case law as provided by the Norwegian Supreme Court.[150] The constitutional review is applicable to all legislation adopted by the Parliament, as well other substantial legislative acts like royal decrees[151] and delegated legislation.[152]

Within the Spanish regime, it is the Constitution alone that regulates the hierarchical position of all international provisions forming part of the national law. Article 95.1 CE establishes the rule that international conventions will

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146 Cf. Section 3 of the Norwegian Human Rights Act (Menneskerettsloven av 21. mai 1999 nr. 30*)*

147 Section 2 of the EEA Act (EØS-loven av 27. november 1992 nr. 109)

148 Section 2 EEA Act

149 The courts also have a right to perform a judicial review on the constitutionality as well as legality of decisions made by the Public Administration; see Andenæs (2006) p. 359 et seq.

150 See Andenæs (2006) p. 345 et seq. and Rt-2007-1308, especially section 35 – 42 with further references.

151 Section 17 NC

152 Andenæs (2006) p. 357

have a status inferior to the Constitution, as «the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment. » In accordance with Article 78.1 of the *Ley Orgánica*[153] on the Constitutional Court (LOTC),[154] The Constitutional Tribunal may give a judgement related to

> « (…) the existence or nonexistence of contradiction between the Constitution and the provisions of an international treaty which text is finally set, but to which the State has not given its consent to be bound. »

Even though this provision describes a control prior to the ratification, an interpretation by negative implication is not to be applied: All international provision will pass as a part of the Spanish legal system through its publication in BOE, and consequently be subject to the same control that the Tribunal has the power to exercise over all Spanish legislation, cf. Article 161 CE and Article 27.2 LOTC.[155] If the Tribunal declares that all or some provisions of a treaty are unconstitutional and so inapplicable, the Government will have to take measures in order to modify the international obligations of the State.[156]

In contrast to the Norwegian system in which enacted provisions get the same hierarchical status as their implementing source of law, the Spanish Constitution separates between *passive* and *active* legal impact of incorporated provisions. Besides inferiority to the Constitution, all enacted international provisions possess a passive or resistant legal force on the internal legislation in the sense that they cannot be derogated by domestic law.[157] This ensures a convention's supremacy over both prior and subsequent legal acts,[158] and implies that if a provision of a convention and an internal rule are in conflict, the international provision will prevail.[159] However, in order for an international provision to obtain *active* legal impact and thus having the power to abrogate or modify a domestic legal provision, the convention as such must have been

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153 See footnote 129 on p. 3

154 Ley Orgánica del Tribunal Constitucional de 03/10/1979, BOE núm. 239 de 05/10/1979. See also Art 95.2 CE.

155 See Díez de Velasco (2007) p. 249, Merino-Blanco (2006) p. 36

156 Merino-Blanco (2006) p. 36

157 Art 96.1 CE

158 Díez de Velasco (2007) p. 249

159 Merino-Blanco (2006) p. 36. See also González Cabrera, Inmaculada. *La limitación de la responsabilidad del naviero: Una aproximación al ámbito de las normas internas y las normas convencionales.* In: Revista de Derecho Privado No. 10/2002, p. [725]-753; p. 790 for further references to case law confirming the supremacy of International conventions over internal law.

approved by the Parliament *prior* to its ratification.[160] This rule results from the interpretation of the Articles 94 and 96 CE. Article 94 CE lists the cases in which «the giving of the consent of the State to enter any commitment by means of treaty or agreement shall require prior authorization of the *Cortes Generales*». Among other specific cases listed, Article 94.1 States that this requirement will apply in general to «treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution».[161] If this rule is seen in context with Article 96 which establishes the passive legal impact on domestic legislation of all incorporated international conventions, one may by deduction see that when the conclusion of an international agreement lies within the exclusive competence of the Government, their provisions will not obtain any active legal impact on domestic law.[162] In other words: the Parliament's approval can be considered as an extension or delegation of the legislative powers.[163] The Norwegian Constitution also contains rules on the Parliaments approval prior to ratification,[164] but these are not connected with the hierarchical position an incorporated convention is given after its ratification and incorporation.

This review has shown that while international provisions incorporated into the Norwegian legislation holds a status equal to the implementing norm, the Spanish regime assigns such provisions with a status higher than the ordinary legislation. If an existing incorporated provision and a more recent internal measure adopted through an ordinary act of law were to regulate the exact same material, these findings will result in the prevalence of the internal provision within Norwegian legislation, and of the international under Spanish law. However, even though the isolated application of the principle of lex superior indicates that the Spanish regime provides a better protection of the uniformity of international conventions, it would be wrong to say that it is jeopardised by the Norwegian method: One must also take into consideration the minimal risk of contradictory provisions as a result of the Norwegian legislator's aim to adopt laws in conformity with the State's international obligations.[165]

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160 Royo, Javier Pérez. *Las Fuentes del Derecho*. 5. ed., Madrid 2007, p. 170 and Merino-Blanco (2006) p. 36

161 Art 94.1.e CE

162 Royo (2008) p. 170 - 171

163 Merino-Blanco (2006) p. 36

164 Sections 26.2 and 93 NC

165 Even though this discussion is based on a situation with «total inconsistency» between the internal and incorporated provision, it can be noted that the incorporated provisions of the

IV
Interpretation and application

10 The Conventions within the national context

Even though the Norwegian and Spanish methods of incorporation do not seem to represent any notable difference on the interpretation and application of incorporated international conventions, it is likely that this procedure will be affected by substantive, internal regulations.

In this chapter I will focus on the interpretation of the Oil Pollution Conventions within the Norwegian and Spanish legal context. The discussion is related to the second part of the principal problem, namely whether the national *interpretation* of the Oil Pollution Conventions cause divergence between the Norwegian and Spanish rules on a third party's right to compensation for oil pollution damage caused by ships. I have divided this chapter into *9* subchapters in an attempt to reflect the central aspects of the Conventions. These chapters deal with both requirements for them to apply, and to the legal consequences of their application.

Although the right to compensation from the 1992 Fund Convention and the 2003 Supplementary Fund Protocol mainly relies on the fulfilment of conditions identical to the ones applying under the CLC 92, these Funds are independent organizations and subject to somewhat different rules on liability than the strict civil liability applying to the ship owner and his insurer under the CLC 92. These aspects will be separately commented on in Chapter IV10.7. I will also include a short discussion on the possibility to obtain compensation from legal persons who are not explicitly protected under the channelling rules.[166]

In relation to the enactment of the IOPC Funds Conventions into Norwegian law,[167] the applied method of incorporation has resulted in the wording of the Norwegian measures being the same as in the Conventions themselves. Even though this basically is the same method applied under Spanish law, I will focus

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CLC 92 and the Bunkers Convention would prevail a more recent *general* provision on the liability for environmental damage – just as they prevail the provisions of Chapter 8 NPCS.

166 See Chapter IV10.4

167 Section 291 NMC. The only exceptions relate to the provision on an oil receiver's duty to contribute to the IOPC Funds, and in relation to Norwegian courts' jurisdiction in civil actions against the Funds, cf. Sections 202 and 204 NMC.

more on of the fully implemented rules of the CLC 92 and the Bunkers Convention in the following. Any particular problems arising in relation to the IOPC Funds will be addressed in Chapter IV10.7.

Each of these subchapters will begin with a reference to the applicable international provisions and continue with their expression as part of the Norwegian and Spanish legal framework. Any differences between the national regimes will be consecutively commented on.

10.1 Scope of application

The application of the Oil Pollution Conventions requires the fulfilment of both geographical and objective elements.[168] The geographical aspect refers to the location of the oil pollution damage, while the objective elements include characteristics of the ship and of the spilled oil.

10.1.1 *The geographical conditions*

All the Conventions apply to «pollution damage caused in the territory, including the territorial sea» and the «exclusive economic zone» or equivalent of a Contracting State. The rules do not separate between incidents of national or international origin; both are included as long as the damage *arises* within the listed areas. The incident as such could even occur on the High Sea, as long as the pollution damage arises within the geographical scope of the Conventions.[169] Nevertheless, the damage must be caused during the following six years from the incident, as this is the absolute time bar for claims.[170] Besides this, «preventive measures, wherever taken» will also be covered if the remaining conditions are met.[171]

Even though the geographical aspect of the scope of application is the same for both the CLC 92 and the Bunkers Convention, it is separately regulated under the corresponding part of the NMC; see Section 190 and Section 206 NMC. Both Sections do however cover the same geographical area as the Conventions. The only difference between the Conventions and the Norwegian regulations lies within the wording, as Section 190 and 206 NMC separate between damages incurred within the Norwegian territory or EEZ and within

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168 García (2006) p. 790

169 Arroyo (2005) p. 756

170 Art VIII CLC 92, Art 6 1992 Fund Convention, Art 6.1 2003 Supplementary Fund Protocol and Art 8 Bunkers Convention; see also Chapter IV10.9.

171 Art II CLC 92, Art 2 1992 Fund Convention, Art 3 2003 Supplementary Fund Protocol and Art 3 Bunkers Convention

the territory or EEZ of *another* Contracting State.[172] This does not change the rules of application, and is probably done just to make the provision more accessible to the reader.[173]

As the CLC 92 was incorporated into Spanish law by the publication of the Instrument of Adhesion to the 1992 Protocol of the CLC 69,[174] the definitions concerning the geographical scope are directly applicable. However, as there is no Spanish EEZ[175] in the Mediterranean Sea, «an area beyond and adjacent to the territory sea of that State, determined by the State in accordance with international law and extending no more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured»[176] has been established through the Common Declaration of Spain, France and Italia on the application of the CLC 92 and the 1992 Fund Convention.[177] This declaration is made strictly for the purpose of the application of the Conventions, and will not «prejudice present or future disputes and legal views of any Party (…) concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction».[178]

So far, it seems like the two States have made the Conventions applicable to the same geographical areas. However, pollution damage caused on *the high sea* wherever national tort law is applicable, including the continental shelf situated outside the EEZ remains outside the Conventions regulation. If such damage should occur, the applicable rules must be found within the national legislation. Additionally, if the spill is caused by a tanker, the national rules must not only govern the grounds for liability, but also the rules on its limitation. This loophole is created by Article 3 (b) LLMC 76/96, which prevents the responsible party from invoking any limitation pursuant to the Convention if the claim is related to oil pollution damage «within the meaning of» the CLC 92:

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172 Section 206 (1) a), b) and Section 190 (1) a), b).

173 See Ot.prp.nr.21 (1994-1995) p. 16 where the Ministry of Justice suggests such to divide the first paragraph of Section 206 by using letters. This reason for such division was to make the text more clear. Section 206 was adopted many years before Section 191, and has, together with the rest of Chapter 10, part II probably been used as model for the new regulations implementing the Bunkers Convention.

174 BOE núm. 225 de 20/09/1995

175 The Spanish EEZ towards the Atlantic Ocean, the Cantabrian Sea, peninsulas and islands included, is established in Ley 15/1978 on the Spanish Exclusive Economic Zone. See also Diez de Velasco (2007) pp. 529 - 533

176 Art II (a) (ii) CLC 92, Art 2 (a) (ii) Bunkers Convention

177 BOE núm. 150 de 23/06/2001

178 English translation submitted to the 1992 Fund, see 92FUND/A.5/18/1

> «The rules of this Convention shall not apply to: (…) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force».

This rule has been implemented into the Norwegian legislation through Section 173.1.2 NMC,[179] and is directly applicable as Spanish law.[180]

The NMC contains two provisions regulating the liability for damage caused outside the scope of application of the Oil Pollution Conventions: Section 207 applies to damage caused by *tankers* which is not covered by neither the CLC 92 nor the LLMC 76/96, while Section 208 deals with other oil spill.

Pursuant to Section 207, the owner of a *tanker* will be liable for oil pollution damage caused «on the part of the Norwegian continental shelf situated outside the Norwegian EEZ, or on the high sea wherever Norwegian tort law is applicable. » This rule covers the cases in which neither the CLC 92 nor the LLMC 76/96 apply, and the Norwegian solution has been to extend the rules of the CLC 92 regarding strict liability, compensatory losses, exemption of liability and limitation of liability to this area regulated merely by national law.

As of the moment the Bunkers Convention entered into force on 21 November 2008, both pollution damage caused by oil spill from tankers and from non-tankers were covered by international liability rules. Prior to this situation, the spill of bunker oil from non-tankers was regulated under Section 208 NMC. Today this Section covers whatever area of jurisdiction that might not be covered by the Bunkers Convention. These areas are basically the same as the ones explicitly governed by Section 207 NMC; the part of the Norwegian continental shelf situated outside the Norwegian EEZ, or on the high sea wherever Norwegian tort law is applicable. The liability limits are subject to the ones in the LLMC 76/96,[181] which is implemented as the general limitation regime of maritime claims in Chapter 9 NMC.

Spain does not have any particular regulation on the geographical area of application beyond the rules in the incorporated Convention. Liability for oil pollution damage falling outside the CLC 92 and the Bunkers Convention would thus be subject to ordinary provisions on tort law, such as the general rule in Article 1902 CC on liability based on fault or negligence, the strict liability of the Spanish Public Authorities for the wrongful functioning of public services pursuant to Articles 139 ff. LRJAP, or the rules on civil liability deriving

[179] See Chapter II6.2

[180] BOE núm. 50 de 28/02/2005

[181] Section 208.3 NMC

from the commission of a criminal offence in Articles 119-121 CP. The regime governing the limitation of claims will in principle be the rules established in the LLMC 76/96,[182] but a problem arises as these rules do not cover claims related to oil pollution damage «within the meaning of» the CLC 92.[183] The result seems to be, as there is no particular regulation for oil spill caused by *tankers* on the high sea wherever national tort law is applicable, that a party responsible under national tort law will be unlimitedly liable for all claims arising from such a spill.

10.1.2 *The objective conditions*

Besides the geographical conditions, the application of the Oil Pollution Conventions also depends on the fulfilment of criteria regarding the vessel, the incident and the oil causing the damage.

(a) «Ship»

The CLC 92, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol apply to oil pollution damage caused by a «ship» within the meaning of

> «any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard. »

In short, the CLC 92 and the IOPC Funds Conventions are applicable to oil spill damage caused by *oil tankers* containing, at least, *residues* of oil carried in bulk as cargo.

The rules of the Bunkers Convention apply to «any seagoing vessel and seaborne craft, of any type whatsoever». This definition does however have its exceptions, one of them being that the Convention never will apply to «pollution damage as defined in the [CLC 92] ».[184] The result is that the Bunkers Convention in principle is applicable to all vessels not covered under the CLC 92.

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182 Carballo-Calero, Pablo Fernández and Francisco Torres Pérez. *Aseguramiento de la responsabilidad civil por contaminación marina: la intervención del los clubs de P&I*. In: Meilán Gil, José Luís… [et al.]. *Estudios sobre el régimen jurídico de los vertidos de buques en el medio marino*. Cizur Menor (Navarra), 2006. p. [491] – 520, p. 504

183 Art 3 (b) LLMC 76/96

184 Art 4.1 Bunkers Convention

Another exception, which also applies to ships covered by the CLC 92 and the IOPC Fund Conventions, is that the Conventions will not apply to pollution damage caused by «warships» «or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service. »[185] In respect of ships owned by a Contracting State and actually being used for «commercial purposes», the Conventions include a provision stating that «each State shall be subject to suit (…) and shall waive all defences based on its status as a sovereign State».[186] The Contracting States cannot evade this provision by reservation. However, any claim resulting from oil spill damage caused by a State Ship on Government non-c*ommercial service* is excluded from the application of the international provisions.

At this point, the rules provided for in the CLC 92-regime and in the Bunkers Convention are not entirely the same. The difference is caused by Article 4.3 of the Bunkers Convention which provides each of the Contracting States with the option of applying the Convention to oil spill pollution caused by an incident with one of their *own* ships performing a Government non-commercial service.[187] Besides this particular rule, neither of the Conventions is applicable to oil spill damage caused by ships on a Government non-commercial service if owned or operated by a foreign State. The liability for such damage is subject to internal regulation, and has met different solutions under Norwegian and Spanish law respectively. Nevertheless, as the regulations on compensation from the IOPC Funds is subject to the international rules laid down in the 1992 Fund Convention and the 2003 Supplementary Fund Protocol, the internal legislation is only applicable to the civil liability incurred within the State's jurisdiction.

Under Norwegian law, the equivalent of Article XI.1 CLC 92 on the exclusion of non-commercial State ships from its application is found in Section 206.3 NMC, and supplemented by Section 207.1 NMC. The latter Section governs the liability for oil pollution damage caused *outside* the scope of the CLC 92. As described in Chapter IV10.1.1, this provision extends the central rules of the CLC 92 to incidents in which ordinary oil-tankers are included but where the pollution damage arise outside the geographical scope of application of the Convention.[188] However, the wording of Section 207.1

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185 Art XI.1 CLC 92, Art 4.2 (a) 1992 Fund Convention, Art 4.1 2003 Supplementary Fund Protocol and Art 4.2 Bunkers Convention

186 Art XI.2 CLC 92, Art 4.4 Bunkers Convention

187 Art 4.3 Bunkers Convention

188 See Chapter IV10.1.1

does also State that such extension will be applicable to «ships as described under Section 206.3, whenever oil pollution damage occurs within the [Norwegian] territory or within the Norwegian EEZ», as well as preventive measures taken to «avoid or limit such damage». In other words; oil pollution damage or preventive measured caused by a ship owned or operated by a State and used, for the time being, only on Government non-commercial service, will be subject to the same rules as spill covered by the CLC 92, provided that it occurs within the Norwegian territory or EEZ.

In relation to the Bunkers Convention, Norway has made use of the option given in Article 4.3 of the Convention, which makes the Convention applicable to oil spill damage caused by *Norwegian* ships performing a Government non-commercial service.[189] As any damage caused by a ship owned by another Contracting State and used for commercial purposes will be covered due to their obligation under the Bunkers Convention to «waive all defences based on its status as a sovereign State»[190], the only remaining loophole is oil spill damage caused by foreign State ships on Government non-commercial service.[191] Article 4.3 of the Bunkers Convention is implemented through Section 190.3 NMC, first clause. However, just like the method applied to cover the same loophole under the CLC 92, the Norwegian legislator has extended the rules of the Bunkers Convention so that they cover pollution damage caused by these ships whenever the damage occurs «within the [Norwegian] territory or within the Norwegian EEZ», as well as preventive measures, cf. the second clause of Section 190.3 NMC.

The cited rules of Sections 207.1 cf. 206.3 and 190.3 NMC do not separate between Norwegian and foreign ships. A question is however if the principle of immunity applying to non-commercial State ships may prevent their legal enforcement, as the owning State may invoke a defence based on this principle before a court, and thus impede the execution of any claim for compensation.[192] This rule of immunity is a widespread principle of international law. It is not only upheld by Article 3 of the International Convention for the unification of certain rules concerning the immunity of State-owned ships of 1926, as amended by the Protocol of 1934 (The 1926 Brussels Convention), but also recognised in the Law of the Sea Convention[193] and in many more of the

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189 See the IMO doc. BUNKERS.1/Circ.12 of 12 March 2008 and Section 190.3 NMC

190 Art 4.4 Bunkers Convention

191 Art 4.2 Bunkers Convention

192 Fox, Hasel. *The Law of State Immunity*. In Series: The Oxford international law library. Oxford: Oxford University Press, 2002 p. 1

193 Articles 29 – 32 UNCLOS

multilateral Conventions regulating seagoing vessels,[194] including the Oil Pollution Conventions. On this background, it must be reasonable to consider the principle of immunity for State Ships on Government non-commercial service as customary international law. Besides, Norway is a Contracting Party to the 1926 Brussels Convention, and the substantial rule on the immunity of State ships is implemented through the Norwegian Act relating to enforcement of claims, Section 1-6. The general rule expressed in the first paragraph is applicable to all foreign States,[195] and States that

> «No legal enforcement shall be promoted in respect of warships or other ships owned, operated or chartered entirely by a foreign State, whenever the ship is being used for Government non-commercial service only. »[196]

This means that Norway is obliged by both international law and national law to refrain from promoting legal enforcement of any claim for compensation for oil pollution damage caused by a non-commercial State ship.

Nevertheless, according to Statements propound in the preparatory works related to the ratification and implementation of the CLC 69 and the 1971 Funds Convention, the Committee[197] behind the draft law were well aware of this issue.[198] Their motive for including rules on liability applying to foreign non-commercial State ships does not seem to be based in the prospect of actually carrying out such enforcement within Norwegian jurisdiction, but to support a Norwegian oil pollution victim facing legal proceedings within a court of the flag State. Even though the flag State will have jurisdiction in these cases, it is likely that the rules of international private law will prescribe Norwegian law as the applicable choice of law, for instance by the theory *lex loci delicti*, which refers to that liability should be governed by the law of the place where the wrongful act was committed.[199] If this is the case, a Norwegian rule imposing strict liability to the owner of non-commercial State ships might influence the foreign court's evaluation of the question of liability.[200] In regard

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194 Fox (2002) p. 392

195 Ot.prp.nr.65 (1990-1991) Om lov om tvangsfullbyrding og midlertidig sikring p. 76

196 Section 1.6 first paragraph, first clause

197 The Maritime Act Committee is a standing committee appointed by Royal decree of 21 December 1956, with a mandate to consecutively undertake a revision of the current NMC and associated legislation in accordance with the Ministry of Justice and the Polices' further decisions, see Ot.prp.nr. 32 (1982-1983) p. 6. In relation to the preparation of NOU 1973:46, the Committee was under the direction of Professor Sjur Brækhus.

198 NOU 1973:46 *Erstatningsansvar for skade ved oljesøl fra skip*, p. 42

199 See NOU 1973:46 p. 43, Arts 5.3 and 9 of the Lugano Convention, and Arts 5.3 and 5.4 of the Brussels I Regulation (OJ 2001 L 12, p.1)

200 NOU 1973:46 p. 43

of incidents occurring within the territorial sea, Article 31 UNCLOS must also be taken into consideration. The provision reads: «The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea (…) ».

In contrast to the Norwegian regime, the Spanish legislator has not adopted any particular provisions in order to supply the Conventions in the material of pollution damage caused by non-commercial State ships. Besides, Spain has opted not to make the Bunkers Convention applicable to oil pollution damage caused by a Spanish ship performing a Government non-commercial service.[201] This will not have much effect on a third party's right to compensation within the Spanish jurisdiction, as the liability of the Spanish State for damage caused by a national non-commercial State ship would be subject to the rules on the vicarious civil liability deriving from the commission of a criminal offence cf. Article 109 and 121 CP, or the strict vicarious liability of Public Authorities pursuant to Articles 139 ff. LRJAP[202] The liability of foreign States resulting from oil pollution damage caused by their non-commercial State ships would however be subject to ordinary rules of tort law such as Article 1902 CC. In both cases would the States' right to limit their liability depend on the applicability of the LLMC 76/96.[203] If the damage resulted from the escape or discharge from oil from a tanker, their liability would be unlimited.[204]

(b) «Oil » and «incident»

The second and third objective conditions to be met relates to the «incident» that leads to the escape or discharge of oil, and the type of «oil» being spilled and thus causing the pollution damage.

All the Oil Pollution Conventions apply to the same type of «incident», which may consist of «any occurrence, or series of occurrences having the same origin, which causes pollution damage» or that «creates a grave and imminent threat of causing such damage. »[205] From the wording it can be deducted that pollution damage only will be sustained as a result of an «incident» if there is a

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201 Art 4.3 Bunkers Convention

202 See Art 8.4 PLGNM. These bases for liability will be further discussed in Chapter IV10.4.3.

203 The State would be the «shipowner» in terms of the definition provided by Art 1.1 cf. Art 1.2 LLMC 76/96.

204 Art 3 (b) LLMC 76/96

205 Art I.8 CLC 92, Art 1.2 1992 Fund Convention, Art 1.6 2003 Supplementary Fund Protocol and Art 1.8 Bunkers Convention

link of causation between the damage and occurrence(s).[206] The definition as such is directly applicable in Spanish law through the incorporated Conventions. The Norwegian legislator has not implemented this definition through an independent provision, but its content is nevertheless expressed through Sections 191.2 (b) and 183.2 (b) as part of the definition of preventive measures.

When it comes to the type of «oil» causing the pollution damage, the definition is not the same under the CLC-regime and Bunkers Convention. The CLC 92 and the IOPC Fund Conventions apply to

> « … persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of [a tanker] ».[207]

As the wording indicates, the rules pursuant to the CLC 92 and the IOPC Funds Conventions will not only be applicable to damage caused by oil carried as cargo, but also to persistent hydrocarbon mineral whenever carried on board in the bunkers. The fundamental condition for such application is however that the vessel qualifies as a «ship» within the meaning of the CLC 92-regime,[208] which implies that the oil must come from an *oil tanker* containing at least *residues* of oil carried in bulk as cargo.

Even though the CLC 92 only applies to persistent oil, it does not define the meaning of «persistent». According to the 1992 Fund's Claims Manual of December 2008,[209] the examples Stated in the Convention refers to versions of persistent hydrocarbon mineral oil that are slow to dissipate naturally, and therefore likely to spread and require cleaning up. Damage caused by spills of non-persistent mineral oil is not covered, as oil such as gasoline; light diesel oil and kerosene tend to evaporate quickly, without requiring any clean-up operation.[210]

The Bunker Convention applies to pollution damage caused by «Bunker oil», in the sense of

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206 See de la Rue (2009) p. 92-94 for examples on intervening acts or omissions.

207 Art I.6 (a), cf. Art I.1 CLC 92. See also Art 3 (a) cf. Art 1.2 1992 Fund Convention, and the Art 3 (a) cf. Art 1.6 2003 Supplementary Fund Protocol

208 By the term «the CLC-92-regime» I refer to the CLC 92 and the two additional tiers; the 1992 Fund Convention and the 2003 Supplementary Fund Protocol.

209 Paragraph 1.3, p. 11

210 See also de la Rue (1998) p. 86 and the 1971 Fund document «A Non-technical Guide to the Nature and Definition of Persistent Oil, found in 71FUND/A.4/11 and 71/FUND/A.4/16.

«… any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship [the non-tanker], and any residues of such oil».[211]

Within the Norwegian legislation, conditions on the covered oil under both the CLC 92 and the Bunkers Convention appear to be quite literally copied through the implementation in Section 191 NMC (CLC 92) and Section 183 NMC (Bunkers Convention). The international regime is supplemented by the internal provision Section 208 NMC, which extends the rules of CLC 92 on strict liability, compensatory losses and exemption of liability to oil spill damage caused by any other type of oil. Such liability would however be subject to the liability limits of the LLMC 76/96, see Section 208.4 cf. 208.3 NMC.

The Spanish legislation consists of the directly applicable provisions of the incorporated Conventions, and does not amend the international regime in any way at this point.

10.2 Compensatory losses

The definition of «pollution damage» is the same in all the Oil Pollution Conventions. For this reason, the concept should be interpreted the same way independent of whether the claim is against the owner or his insurer under the CLC 92, or against the IOPC Funds under the 1992 Fund Convention and the 2003 Supplementary Fund Protocol.[212] At an international level the exact definition of «pollution damage» is partly explained through the wording of the Oil Pollution Conventions, and further guidance is given in the IOPC Fund's Claims Manual[213]. This Manual is to be considered a practical guidance to claims that most likely will be approved by the IOPC Funds, and not as an authoritative interpretation of the Conventions.[214]

Whenever a pollution claim is assessed by a claimants' domestic court, the applicable provisions of the Oil Pollution Conventions will not be purely international, but incorporated, national law. This means that the court will interpret the Conventions and thereby also the scope of the compensatory

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211 Bunkers Convention Art 2 (a), cf. Art 1 No. 9 (a), cf. Art 1 No. 5

212 Jacobsson, Måns. *The International Oil Pollution Compensation Fund and the International Regime of Compensation for Oil Pollution Damage.* In: Pollution of the Sea – Prevention and Compensation, edited by Basedow/ Magnus, in series: Hamburg studies on maritime affairs vol. 10, Berlin 2007, p. [137]-150, p. 143-144

213 The International Oil Pollution Compensation Fund 1992; *Claims Manual, December 2008 Edition*. http://www.iopcfund.org/npdf/2008%20claims%20manual_e.pdf [1 June 2009]

214 See Chapter II4.2

«pollution damage» in accordance with other corresponding internal law. Even though the Conventions qualify as national law once they are incorporated, they still form part of a larger, international regime. All injured parties and their claims should be treated the same way, independent of the Contracting State where the damage was sustained. Besides the focus on equity, it is important to remember that the clean-up operations and other claims in one State will be paid by the oil industry in one of the other Contracting States whenever the IOPC Funds are involved. The interpretation of the Conventions should stay consistent and uniform in order to avoid any risk for political tension between the Contracting States that could jeopardise the compensation system.[215] Yet another reason is that the liability limits are designed to cover certain types of damage. If the national courts should allow claims for additional damage, it would hamper the system. This is why uniform interpretation of the definition «pollution damage» is essential.[216]

All the Conventions apply to «pollution damage»[217] in the terms of

> « (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of [bunker[218]] oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinStatement actually undertaken or to be undertaken; and
>
> (b) the costs of preventive measures and further loss or damage caused by preventive measures.»[219]

The definition of «pollution damage» even covers the costs of preventive measures taken in the absence of an actual oil spill, if only they were taken in relation to an occurrence qualifying as an «incident» to «prevent» the realization of a «grate and imminent threat of pollution damage».[220] All these aspects of the definitions are incorporated into Norwegian and Spanish law

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215 Jacobsson (2007) p. 143

216 Jacobssen (2007) p. 143, Annual Report 2008 p. 30

217 Art II (a) CLC 92, Art 3 1992 Fund Convention, Art 3 2003 Supplementary Fund Protocol and Art 2 (a) Bunkers Convention.

218 Particular condition under Article 1.9 Bunkers Convention

219 Art I.6 CLC 92, Art 1.2 1992 Fund Convention, Art 1.6 2003 Supplementary Fund Protocol and Art 1.9 Bunkers Convention

220 Arts I.7 cf. I.8 CLC 92, Art 1.2 1992 Fund Convention, Art 1.6 2003 Supplementary Fund Protocol and Arts 1.7 cf. 1.8 Bunkers Convention. See Wolfrum, Rüdiger. *Maritime Pollution – Compensation or Enforcement?* In: Pollution of the Sea – Prevention and Compensation, edited by Basedow/ Magnus, in series: Hamburg studies on maritime affairs vol. 10, Berlin 2007, p. [128]–136, p. 133.

respectively without any national supplements.[221] The basis for the further analysis is therefore that the statutory basis is the same, except from the language. The potentially broader interpretation of compensatory damage will first be expressed when the national court applies the incorporated provisions in the assessment of different types of claims for oil pollution damage.

Even without national courts extending the definition, «pollution damage» covers a wide range of different claims. The main categories are property damage, clean-up operations on shore and at sea, preventive measures wherever taken, consequential loss, pure economic loss, reasonable measures of reinstatement of the environment, and to some extent the use of advisers assisting in the presentation of claims.[222] Besides the nature of the cost or damage, it must also result from the escape or discharge of [bunker] oil, or from the impairment of the environment, the damage must actually have incurred («caused»), and it must be quantifiable.[223] As the damage must *result* from the escape or discharge of oil, the Conventions will not cover any damage caused by other consequences of an incident such as explosion of fire.

Although there is no controversy related to the listed types of damage,[224] the wording defining the term does not exclude the possibility of interpreting «pollution damage» to cover more types of damage in accordance with potential, internal provisions.[225] The main controversy is related to general, unquantifiable damage to the environment.[226]

The wording of the Conventions clearly provides that compensation under the Conventions only will be available to cover the costs of reasonable measures of «reinstatement». Accordingly, the wording affirms the position that assessments of damage to the environment's intrinsic value arrived at by using abstract mathematical models or contingent valuation cannot be compensated.[227] However, the wording does not clearly preclude Contracting States from interpreting the provisions in accordance with internal principles

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221 Section 191.1 and 2 NMC, Section 181.1 and 2 NMC. The 1992 Fund Convention and 2003 Supplementary Fund Protocol are mainly incorporated by referral, and their definition of «pollution damage» will be directly applicable. The same applies to Spain in relation to all the Oil Pollution Conventions.

222 Jacobsson (2007) p. 140-142, Claims Manual (2008)

223 Claims Manual (2008), paragraph 1.5.1.

224 García (2006) p. 794

225 Tan, Alan Khee-Jin. *Vessel Source Marine Pollution*. Cambridge, 2006 p. 329

226 Tsimplis, Dr. Michaels N. *The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?* In: Lloyd's maritime and commercial law quarterly, No 1 – 127, 2005, p. [83]–100, p. 86.

227 Tan (2006) p. 329

that might open for compensation of pure, ecological damage.[228] In accordance with the particular principles of interpretation applying to international provisions,[229] the national court should bear in mind that the wording as such do not open for such claims directly under the Conventions, and that this sort of claim was not intended to be covered when the Conventions were adopted.[230]

Nevertheless; when it comes to the Norwegian and Spanish principles on compensatory losses within tort law, there are no indications that pure ecological damage would be covered. Within the Norwegian tort law, the main principle is that the injured party has the right to full compensation for his entire, *economical* loss; see Section 4-1 SKL[231]. Non-pecuniary losses are in principle not compensated.[232] This means that pure ecological loss would not be considered as a compensatory damage. An exception is found in Section 58 NPCA,[233] which will supplement the interpretation of the incorporated provisions in the NMC. [234] According to this provision, compensation may be claimed for

> « (…) pollution that is not permitted and that hinders, impedes or limits the benefit of exercising rights of common for non-commercial purposes; provided that this applies to reasonable costs of restoring the environment so that rights of common can as far as possible be exercised as before. »[235]

Such a claim can be made by the municipal or county pollution control authority, but also by a private organization or an association with a «legal interest»[236] in the matter.[237] However, the compensation awarded shall accrue

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228 Tan (2006) p. 329

229 Art 31 VCLT, see Chapter II4.2

230 IMO Doc LEG/CONF.12/9. In relation to the adoption of the Bunkers Convention, lack of time was supposedly the reason for why the definition of pollution damage related to the impairment of the environment was not further clarified in relation to national supplements, see Tsimplis (2005) p. 99.

231 See also Lødrup, Peter. *Lærebok i erstatningsrett*. 5. utg., Oslo 2005 p. 335 and Nygaard, Nils. *Skade og ansvar*. 5. utg., Bergen 2000 p. 61.

232 Exceptions apply for the compensation for permanent injury (*menerstatning*) and for injury of non-pecuniary character (*oppreisning*) within the rules on personal injury, see Sections 3-2 and 3-5 SKL and Lødrup, Peter. *Lærebok ierstatningsrett.* 4. utg., Oslo 1999 p. 397

233 Norwegian Pollution Control Act 1981

234 Section 53.1 NPCA. See also Chapter II6.2.

235 Section 58.1 NPCA

236 The term «legal interest» is one of the requirements that must be fulfilled before a court may decide a case, see Section 1-4 of the Act relating to mediation and procedure in civil disputes (Act of 17 June 2005 No. 90, Tvisteloven) [Dispute Act]. According to this Act, both private persons and organizations may have the right of action if they only fulfill the requirement of «legal interest», see Section 1-3.2 of the Dispute Act.

237 Section 58.1 and 2 NPCA

to the pollution control authority so that reinstating measures can be taken.[238] This is an exception from the main rule, and in contrast to the Oil Pollution Conventions, the provision does not cover all reasonable measures of «reinstatement»; only to the extent that the rights of common as far as possible can be exercised as before. On this basis, it is safe to conclude that the Oil Pollution Conventions go further that the Norwegian legislation in the field of ecological damage.

Spanish law seems to be even more restrictive in relation to compensation for ecological damage. There are no general, statutory rules on losses qualifying as compensatory damage. Such principles are however found in the *doctrina jurisprudencial*, which is evolved by scholars, based on Spanish case law.[239] The main rule seems to be that traditional Spanish tort law may only be used to indemnify individual rights and interests, and does consequently not protect collective or fragmented interests.[240] This would again imply that the environment as such only may be protected if an environmental damage harms an individual right or asset.[241] Even though Spanish tort law recognize both pecuniary[242] and no-pecuniary damage[243] as compensatory,[244] the compensation of pure ecological damage is barred by the demand for a loss clearly connected to private rights or interests. If there was an exception like the Norwegian Section 58 NPCA, this could perhaps have been solved by assigning a national pollution control authority or a private association with the necessary right of action. As for now, there are no such exceptions.[245]

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238 Section 58.4 NPCA

239 Nieto García (2001) p. 104

240 Del Olmo, Pedro. *Tort and Regulatory Law in Spain*. In: Tort and regulatory law (…) Wien, 2007, p. [251]-293; p. 270-271

241 Del Olmo (2007) p. 269

242 Ponce de León, Luis Díez-Picazo y. *Derecho de daños.* Madrid, 1999, p. 308, 324

243 Non-pecuniary losses are accepted if they qualify as «daño moral», a concept referring to the compensation of phycological consequences that does not lead to any economical loss. The Spanish Tribunal Superior has also referred to this concept as «el precio del dolor»; the price of the pain, which to some extent can compensate the suffering, sorrow, bitterness and sadness resulting from the injurious action, see STS 1291/2001, Sala de lo Penal, of 29 June 2001. See also Pérez, Carlos Granado. *Daño civil derivado del delito.* In: La responsabilidad civil y su problemática actual, edited by Juan Moreno Martínez, Madrid 2007, p. [337]-372, p. 344, Coderch (2006) p. 22-26 and Ponce de León (1999) p. 324.

244 See also Asúa González (1996) p. 462-464

245 Gonzáles, Albert Ruda. *El daño ecológico puro. La responsabilidad civil por el deterjo del medio ambiente.* Doctorate thesis. Supervised by Miquel Martín i Casals. Universitat de Girona, España, 2006. Available from http://dialnet.unirioja.es/servlet/tesis?codigo=7626 [1 June 2009], p. 143-144

Based on these observations, it seems like an injured party would have the same right to compensation for his claim when it comes to the types of pollution damage accepted. The Oil Pollution Conventions accepts more types of claims than the national law of both States.

10.3 Rules on liability under the Conventions

One of the main features of the CLC 92 and the Bunkers Convention is the strict but limited liability applying to «the owner of a ship» for causing oil pollution damage within the scope of the Conventions.[246] Even though the owner might be exempted from his obligation if he can prove that the pollution damage results from a situation he could not possibly control; situations which are exhaustively listed in Article III of the CLC 92 and Article 3 of the Bunkers Convention, this rigid rule facilitates the injured party's possibility of obtaining compensation for his loss. Otherwise, as a result of the often obscure causal link between the incident, the responsible parties and the pollution damage, it could have been very difficult for the injured party to identify the liable persons and establish their claims.[247] However, the system is not unfair: If someone is to be blamed for the incident causing the damage, the Conventions as such[248] do not prejudice any right of recourse the owner has against third parties.[249] They only intend to make the process easier for the injured party, while the owner is referred to a process of recourse in order to recover his expenses. Even though it is the«owner» who is liable, the Conventions also require the owner of large ships to maintain particular liability *insurance* in the sums fixed by applying the liability limits of the applicable regime.[250]

The person or persons on who liability is imposed, depends on the applicable Convention. Even though both refer to the owner, or to be accurate; the «owner of a ship»[251] and the «shipowner»[252] respectively, the definition included in the Bunkers Convention includes more persons than the CLC 92. If no «registered owner» can be found, the liability under the CLC 92 will be

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246 Art III.1 CLC 92, Art 3.1 Bunkers Convention

247 Zhu, Ling. *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 – Liability and Insurance Aspects.* In: Pollution of the Sea – Prevention and Compensation, edited by Basedow/ Magnus, in series: Hamburg studies on maritime affairs vol. 10, Berlin 2007, p. [171]-180, p. 173

248 There are restrictions within Norwegian law, see Sections 185 and 193.3 NMC.

249 Art III.3 CLC 92, Art 3.6 Bunkers Convention

250 Art VII.1 CLC 92, Art 7 Bunkers Convention

251 Art III.1 CLC 92

252 Art 3.1 Bunkers Convention

imposed on «the person owning the ship».[253] According to Article 1.3 of the Bunkers Convention, «'shipowner' means the owner, including the registered owner, bareboat charterer, manager and operator of the ship». Nevertheless, the most important person is the «registered owner», as this is the only one in need of mandatory liability insurance.[254]

In Article I.1 of the CLC 92, it is stated that «the owner of a ship of the time of an incident (…) shall be liable for any pollution damage caused by the ship as a result of an incident». The wording of the corresponding provision in the Bunkers Convention reads: «the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship (…) ».[255] Independent of the slight differences in the wording, they both express that the owner will incur strict liability by the mere fact that he qualifies as «owner» under the Conventions. There is no need for fault or causal connection between his actions or omission and the pollution damage;[256] the only link necessary is the one established between «the incident» and the «pollution damage».

As already mentioned, the strict liability does not come without exceptions. The Conventions presents identical, exhaustive lists on causes exempting the owner from liability. The burden of proof does however lie with the owner; in order to avail himself of the exception provided, he needs to «prove» that the damage was caused or resulted from one of the following alternatives:

> « (a) [the damage] resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
>
> (b) [the damage] was wholly caused by an act or omission done with the intent to cause damage by a third party; or
>
> (c) [the damage] was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function»[257]

If the owner proves that one of these conditions is met, the result is that «no liability (…) shall attach». Besides the possibility of full exoneration, the

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253 Art III.1 cf. Art III.3 CLC 92

254 The International Group of P&I Clubs suggested to the Diplomatic Conference that in stead of leaving all those persons embraced by the wide definition of shipowner exposed to claims, it would make sense to initially channel all claims to the registered owner. If, and only if, the owner failed to satisfy the claim would the others be exposed. See IMO Doc LEG/CONF.12/9 submitted by the International Group of P&I Clubs. This was also supported by the International Chamber of Shipping, see IMO Doc LEG/CONF.12/10.

255 Art 3.1 Bunkers Convention

256 Arroyo (2005) p. 759

257 Art III.2 CLC 92, Art 3.3 Bunkers Convention.

Conventions also present another exception related to the acts or omission of an injured party, which, if fulfilled, may exonerate the owner «wholly or partly» from liability «to such person». The applying condition for such exemption is that the owner is able to prove «that the pollution damage resulted wholly or partially from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person».[258]

If more than one ship was involved in the incident causing pollution damage,

> « (…) the [ship]owners of all the ships concerned, unless exonerated [under Article III of the CLC 92 or Article 3 of the Bunkers Convention), shall be jointly and severally liable for all such damage which is not reasonably separable.»[259]

As for the implementation of the rules on the liable subject, the strict liability and its exceptions under the CLC 92 into Norwegian legislation, Section 191 NMC provides that «Regardless of fault, the owner of a ship is liable for oil pollution damage. » The Section also reproduces the rules of the CLC in terms of incidents consisting of a series of occurrences having the same origin, in which the liability shall attach to the owner at the time of the first occurrence,[260] as well as the rule on jointly and severally liable owners in the case of incidents involving two or more ships. As for the exemption of liability, the alternatives are listed in Section 192. In the case of an injured party having contributed to the pollution damage by intent or negligence and this is proved by the owner, it is Stated in Section 192.2 that Norwegian tort law[261] will be applicable when deciding to whether or not, or to which extent he may be exonerated from liability. The CLC 92 does not give any guidelines on this assessment, and as the consequences of the implementation of an international provision is that it becomes part of the Norwegian legislation, it is only natural that the provision is supplied by the national rules on tort law.

The implementation of the rules on the liable subject, the strict liability and its exceptions under the Bunkers Convention is to some extent carried out through a referral to the rules in Chapter 10.II NMC, which implements the corresponding provisions under the CLC 92. The principal rule, regarding the liable ship owner, is however independently expressed in Section 183.1 NMC: «Regardless of fault, the owner of a ship is liable for pollution damage caused by bunker oil. » The term «the owner of a ship» is further defined as

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258 Art III.3 CLC 92, Art 3.4 Bunkers Convention. For an in-dept examination of the exceptions, see de la Rue (1998) p. 87 – 94.

259 Art IV CLC 92, Art 5 Bunkers Convention

260 Art III.1 CLC 92, Art 3.1 Bunkers Convention

261 See Section 5-1 SKL

> « (…) owner, including the registered owner, *rederi*[262], bareboat charterer, manager and operator of the ship, or others who are in charge of central functions relating to the operation of the ship. »[263]

This definition is in accordance with the persons embraced by the term «owner of a ship» under Article 1.3 of the Bunkers Convention. The only difference lies in the word «rederi», which is a term in lack of an English equivalent. However, as any «rederi» would equip and run the ship for their own account; independent of the title owner or bareboat charterer, it can not be considered as a particular supplement to the definition under the Bunkers Convention.

In continuation, Section 193.1 NMC States that «Section 191.1, second and third clause, also applies». The referred clauses concern the incidents consisting of a series of occurrences, and the ones involving two or more ships. The same method has been applied in relation to the rule of exemption of liability: Section 184 merely refer to Section 192 NMC, stating that the same rules shall apply to the provisions implementing the Bunkers Convention.

In relation to the rules on the liable subject, the strict liability and its exceptions under the CLC 92 and the Bunkers Convention, the Spanish legislation does not contain any substantial rules supplying the directly applicable, incorporated provisions of these Conventions. As for the evaluation on the wholly or partly exemption of the owner from liability in the event of the injured party's contribution to the damage, the applicable guidelines consist of *doctrina jurisprudencial*,[264] which to some extent has been codified[265] within particular legal areas.[266]

Even though the Conventions provide rules obliging the owner to compensate the injured parties, they also protect him from being liable under any other legal regime applicable under internal law by impeding third parties from establishing claims against him under any other rules than the ones provided in the Conventions themselves. In other words; the owner may benefit from immunity outside the Bunkers Convention. This immunity is expressed

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262 The term «reder» or «rederi» refers to a person or company equipping and running the ship for his/ its own account. Even though a «reder» often will be the owner, the ship may also be leased under a bareboat charter, or requisitioned by the State, see Falkanger & Bull (2004) p. 120 and Falkanger Thor. *Den alminnelige sjørett og de militære fartøyer.* Series: Militærjuridiske småskrifter/ Generaladvokatembetet Bind 13, Oslo 1999, p. 10.

263 Section 183.5 NMC

264 Gómez Pomar, Fernando and Iria Agrafojo Vázquez. *Culpa de la víctima y derecho sancionador.* In: InDret 4/2004 (online). http://www.indret.com/pdf/258_es.pdf [1 June 2009] p. 8– 15.

265 See Art 145 of the Consumer Act (Real Decreto Legislativo 1/2007), Art 1.1 4th paragraph of the Motor Vehicles Liability Act (Real Decreto Legislativo 8/2004), and Art 114 CP

266 Gómez Pomar (2004) p. 8

through the wording «No claim for compensation for pollution damage shall be made against the [ship]owner otherwise than in accordance with this Convention».[267]

The wording of the Norwegian provisions implementing this rule into the national legislation appears to be a word for word translation, except from the fact that they refer to the Norwegian provisions implementing the Conventions in stead of the Conventions as such, see Sections 193.1[268] and 185.1[269] NMC. Within the Spanish legislation, the incorporated, directly applicable international provisions are not supplemented in any way by internal legislation.

Besides providing the only legal ground on which compensation can be claimed from the owner, the CLC 92 also contain a provision on the *channelling* of liability. This means that an injured party's right to claim compensation from an extent list of persons that might be connected to the ship or the salvage operations – on any legal basis - is barred, with few exceptions. This way, claims for pollution damage under the CLC 92 can *only* be made against the registered owner of the ship, which basically means that the liability is channelled to the owner's insurer. Article III.4, second clause, reads:

> « (…) no claim for compensation for pollution damage under this Convention or otherwise may be made against:
>
> (a) the servants or agents of the owner or the members of the crew;
>
> (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
>
> (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
>
> (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
>
> (e) any person taking preventive measures;
>
> (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e)"[270]

An important exception is that the listed parties will lose their protection against an injured party's claims for compensation if

> « (…) the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. »[271]

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267 CLC 92 Art III.4, Bunkers Convention Art 3.5

268 Implementing Art III.4 CLC 92

269 Implementing Art 3.5 Bunkers Convention

270 Art III.4 CLC 92

In the case of a person incurring liability under this provision, it must also be reasonable to assume that he will be liable for the entire claim, without the right to limit his liability in accordance with Article V.1.[272] This presumption is based on the fact that the ship owner himself will «not be entitled to limit his liability under this Convention» if it is proved that he caused the damage recklessly or by intent, and with knowledge that such damage would probably result.[273]

It is also important to note that the channelling rules only apply to the injured party's claim for compensation, not the owner's claim for recourse.[274] Such a claim would be presented before a national court, and, depending on the relation between the owner and his opponent, be subject to rules on contractual or extra contractual liability (tort law).[275]

One problem of particular interest is that the Article III.4 of the CLC 92 does not cover all the parties that might have contributed to the incident causing the pollution damage. These omissions include cargo owners, a coast State intervening in the process leading up to the incident, and classification societies certifying wrecked ships as «in class» prior to their final voyage. The possibility to claim such legal entities for compensation outside the CLC 92 and the Bunkers Convention is briefly discussed in Chapter IV10.4.

The Bunkers Convention lacks rules channelling the liability to the owner, which means that the injured party is entitled to claim any person connected with the incident for compensation. These claims would have to be based in ordinary tort law or legal provisions other than the Bunkers Convention, as the particular ground for liability pursuant to the Convention only applies to the persons within the definition of «shipowner».[276] It is only the *registered* owner who is obliged to keep mandatory liability insurance,[277] and it is likely that his insurer will cover the claims, and thus prevent them from being enforced against other parties. Still, until a claim has been paid, there will be nothing to stop claimants from bringing proceedings jointly against other parties as well as the owner.

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271 Art III.4 CLC 92

272 García (2006) p. 792

273 Art V.2 CLC 92

274 Art III.4 CLC 92.

275 Arroyo (2005) p. 758

276 Art 3.1 Bunkers Convention

277 Art 7.1 Bunkers Convention. The term «registered owner» is defined in Art 1.4, and corresponds to the term «owner» under Article I.3 CLC 92.

Even though the Bunkers Convention as such does not embrace any rules on the channelling of liability, it is supplemented by both Norwegian and Spanish law. These national provisions do not only affect the injured party's right to claim persons other than the owner for compensation, but under Norwegian law, it also hampers the owner's right to recourse under both the CLC 92 and the Bunkers Convention. In continuation, I will give an overview of the national provisions implementing and to some extent supplementing the rules on the channelling of liability, then move on to the owner's right to recourse. Even though the international rules on the owner's right to recourse lacks influence on a third party's right to compensation, it is still an important component of the international regime. A short passage on their interpretation within in the national context will contribute to the big picture, and work as background material in the final analysis on the injured party's right to compensation.

The starting point when it comes to the relationship between the injured party and persons connected to the ship or the salvage operation, is that the CLC 92 contains rules on the channelling of liability, while the Bunkers Convention allows the injured party to claim any person connected with the incident for compensation, as long as the legal basis for the claim is found outside the Convention.

Within the Norwegian legislation, the rules on the channelling of liability under the CLC 92[278] are implemented through Section 193.2:

> «Claims for compensation for oil pollution damage can not be made against:
>
> a) a member of the crew, employee of the owner or others for whom the owner is liable,
>
> b) the pilot or any other person performing services for the ship,
>
> c) the reder or manager if they do not own the ship, and any charterer, sender, shipper, owner or receiver of the cargo,
>
> d) anyone engaged in salvage operations with the consent of the ship or on the instructions of a public authority,
>
> e) anyone taking steps to prevent or limit pollution damage or loss embraced by Section 191 , or
>
> f) employees of persons mentioned in letters b, c, d and e, or others for whom persons mentioned in letters b, c, d or e are liable, except for persons who have themselves caused damage by willful intent or gross negligence, and in the understanding that such damage would probably occur.»

[278] Art III.4 CLC 92

The persons included in subparagraphs (a) and (b) are congruent with the ones mentioned under Article III.4 subparagraphs (a) and (b) of the CLC 92. However, Section 193.2 (c) differs from the corresponding provision of the CLC 92 by adding the legal persons «rederi[279] [if it does] not own the ship», as well as the «sender, shipper, owner or receiver of the cargo». As the «rederi» only will be protected by the channelling rules if the company does not own the ship, the term is fully congruent with the definition «any charterer howsoever described, including a bareboat charterer».[280] The supplement lies in the internal rule including the «sender, shipper, owner or receiver of the cargo» as protected parties under the channelling rules. This is a supplement that can be dated back to the implementation of the rules on the channelling of liability under the CLC 69.[281] When the 1992 Protocol to the CLC 69 was implemented, the Ministry of Justice and the Police assumed that the rules of the Convention did not preclude internal provisions from broadening the scope of application of the channelling rules.[282]

Even though the wording slightly differs, subparagraphs (d) and (e) of Section 193.2 refer to the same persons as the corresponding provisions under the CLC 92. The difference is merely a result of the legislative method applied in the process of implementing the CLC 92: Instead of simply stating that no claims for compensation shall be made against «any person taking *preventive measures*», subparagraph (e) instructs that no such claim shall be made against «anyone taking steps to prevent or limit pollution damage or loss as embraced by Section 191». As mentioned under Chapter IV10.2, Section 191.2 defines the term «pollution damage». Under the Convention, pollution damage does not only consist of loss or damage caused outside the ship, but it also embraces the cost of preventive measures and further loss or damage caused by preventive measures. This division has also been followed under the implementation of the CLC 92, so that the equivalent of «preventive measures»[283] is defined in Section 191.2 (b). The point is that this particular part of the Norwegian legislation does not represent any supplement to the rules of the Convention.

This is not the case with subparagraph (f), which extends the list of employees linked to the persons explicitly exempted from receiving claims for compensation under the list included in Section 192.2 and Article III.4 CLC 92.

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279 See footnote 262 on p. 3

280 Art III.4 (c) CLC 92

281 Ot.prp.nr.21 (1994-1995) p. 13, NOU 1973:46 p. 22

282 Ot.prp.nr.21 (1994–1995) p. 13

283 Art I.6 (b) cf. Art I.7 CLC 92

The addition to the circle of protected people under the Convention, consist of employees of the pilot or any other person performing services for the ship, as well as «others for whom persons mentioned in [Section 193.2] letters b, c, d or e are liable». According to the Ministry of Justice and the Police, the internal supplement is based on the opinion that the motives justifying the exemption of the employees listed under Article III.4 (f) also apply in the case of other employees.[284] However, the general exception under Article III.4, which applies if the «damage resulted from their personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result», is also implemented in Section 193.2 NMC.

In regard of the rules on the channelling of liability under the CLC 92, the Spanish legislation does not represent any exception or supplement to the international regime. The incorporated rules of the CLC 92 will be directly applicable.

As for the Bunkers Convention, which do not contain any rules on the channelling of liability, the internal rules of both Norway and Spain represents a supplement impairing the right of the injured party to seek compensation for pollution damage caused by bunker oil from a non-tanker.

Within the Norwegian legislation, the amendment is found in Section 185.1, within the second and third clause:

> «The provisions on channelling of liability etc. in Section 193 second (…) paragraph[s] appl[ies] correspondingly to liability pursuant to Sections 183 to 190. However, the provision that liability cannot be invoked, cf. Section 193, are not applicable to persons embraced by the definition of the “ship’s owner” in Section 183 fifth paragraph. »

The referral to Section 193.2 is also a referral to the channelling rules under the implemented rules of the CLC 92. In accordance with Section 185.1 second clause, these rules will apply «to liability pursuant to Sections 183 to 190». As Sections 183 to 190 implement the Bunkers Convention, the referral in Section 185.1 means that the rules on the channelling of liability and the owner's right to recourse, as implemented and supplied by internal law, will apply in the case of oil pollution damage under the Bunkers Convention whenever Norwegian law is applicable. Due to the fact that the term «owner» refers to more persons under the Bunkers Convention than the CLC 92, the extension is however limited by the definition of owner in Section 185.1, second clause. This means that besides the registered owner, the injured party may also claim the «reder»[285], the bareboat charterer, the manager and operator of the ship, or

[284] Ot.prp.nr.21 (1994-1995) p. 13

[285] See footnote 262 on p. 3

others who are in charge of central functions relating to the operation of the ship for pollution damage within the meaning of the Bunkers Convention.

Under the Spanish legislation, the supplement is found in the *Real Decreto* 1795/2008, which deals with the coverage of the civil liability under the Bunkers Convention.[286] According to its Article 10,

> «No claim for compensation for pollution damage caused by bunker oil within the meaning of the Bunkers Convention can be made against:
>
> a) Any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority,
>
> b) Any person taking preventive measures, or
>
> c) All employees or agents of persons mentioned in subparagraphs a) and b), unless the damage resulted from their personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result. »

When the wording refers to the terms «pollution damage» and «preventive measures», it is not necessary to look for their definition in the Bunkers Convention itself. Article 3 of the Real Decreto provides its own list of definitions, in which any term deriving from the Convention is reproduced without amendment.

The internal supplements to the rules on the channelling of liability, which are applicable whenever the Conventions are interpreted within the national context, do not only amend the original international regime; they also cause divergence between the Norwegian and Spanish rules on a third party's right to claim compensation from others than the owner for oil pollution damage caused by ships. The central question is however if these differences also affect their overall right to compensation. In order to provide an answer, it is necessary to consider all the differences between the Norwegian and Spanish legislation as a whole. This is what I will intend to do in Part V; Conclusive Remarks.

Even though an injured party will be prevented from establishing claims for compensation against the persons covered under the channelling rules, neither of the Conventions «prejudice[s] any right of recourse of the *owner (…)* »[287]. This is also the case under Spanish law, which contains no supplements to the incorporated provisions in this respect. However, under Norwegian law, the owner's right to claim recourse from many of the persons protected under the channelling rules in respect of claims for compensation under both the CLC 92

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[286] Real Decreto 1795/2008,

[287] CLC 92 Art III No. 5, Bunkers Convention Art 3 No. 6

and the Bunkers Convention depend the person having «caused the damage deliberately or through gross negligence and with knowledge that such damage would probably result».[288] In relation to pollution damage governed by the implemented CLC 92, the only person available for recourse action without any other conditions applying than the ordinary legal principle in respect of recourse is «the *rederi* or manager if they do not own the ship, and any charterer, sender, shipper, owner or receiver of the cargo».[289] The same rule applies to the owner's action for recourse under the Bunkers Convention.[290] However, as the definition of «owner» includes more persons under the Bunkers Convention than under the CLC 92, the application of the rule pursuant to Section 193.1 is once again limited in respect of the persons embraced by the definition of owner in Section 183.5.[291]

[288] Section 192.3 NMC, cf. Section 185.1 NMC, first clause.
[289] Section 192.3 NMC
[290] Section 185.1, second clause
[291] Section 185.1, third clause

No claim for compensation for pollution damage shall be made against:		*CLC 92*	*Spanish L.*	*Norwegian L.*
(a)	The servants or agents of the owner or the members of the crew	√	√	√
(b)	The pilot or any other person who, without being a member of the crew, performs services for the ship.	√	√	√
(c)	Any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship.	√	√	√
(c1)	Any sender, shipper, owner or receiver of the cargo	X	X	√
(c2)	«Reder/ rederi» owning the ship (without being the registered owner), as well as others who are in charge of central functions relating to the operation of the ship	X	X	√
(d)	Any person performing salvage operations with the consent of the owner or on the instruction of a competent public authority	√	√	√
(e)	Any person taking preventive measures	√	√	√
(f)	All servants of agents of persons mentioned in subparagraph …	(c), (d), (e)	(c), (d), (e)	(b), (c), (c1), (d), (e)
Unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result		√	√	√

Table 9.3.1: Rules on the channelling of liability under the CLC 92

«√» means that these persons are explicitly protected against all claims for compensation from the injured party, while «X» means that they are not.

No claim for compensation for pollution damage shall be made against:		*Bunkers C*	*Spanish L.*	*Norwegian L.*
(a)	The servants or agents of the owner or the members of the crew	X	X	√
(b)	The pilot or any other person who, without being a member of the crew, performs services for the ship.	X	X	√
(c)	Any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship.	X	X	X
(c1)	Any sender, shipper, owner or receiver of the cargo	X	X	√
(c2)	«Reder/ rederi» owning the ship (without being the registered owner), as well as others who are in charge of central functions relating to the operation of the ship	X	X	X
(d)	Any person performing salvage operations with the consent of the owner or on the instruction of a competent public authority	X	√	√
(e)	Any person taking preventive measures	X	√	√
(f)	All servants of agents of persons mentioned in subparagraph …	X	(d), (e)	(b), (c1), (d), (e)
Unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result		X	√	√

Table 9.3.2: Rules on the channelling of liability under the Bunkers Convention

«√» means that these persons are explicitly protected against all claims for compensation from the injured party, while «X» means that they are not.

10.3.1 *Coordinating international and Spanish rules on liability*

Even though the Spanish incorporation of the Oil Pollution Conventions seems consistent with the uniformity of the international rules, problems have and may easily arise when claims for compensation under the Convention is to be tried before a national court. The court will not only apply the incorporated international rules, but also Spanish internal law within the fields of procedural law, tort law, administrative law and has history has shown; on many occasions also criminal law. These rules all have to be interpreted so that they can be applied in accordance with one another.

After the oil spills of both the Aegean Sea (1992) and the Prestige (2002), criminal proceedings have been opened.[292] The legislation governing this procedure is the Criminal Code (CP) and the Criminal Procedure Act (LeCrim)[293]. According to Article 109.1 CP, every person who is criminally responsible is also liable for the civil damages caused by commission of the offence.[294] This rule also applied under the prior Criminal Code, which was applicable in the case of the Aegean Sea. Criminal liability is personal, and only the author of the offence can be held responsible. Nevertheless, civil liability arising out of the commission of a criminal offence can extend to persons other than the author of the crime.[295]

On the basis that both types of liability derives from a injurious act or omission, independent of its characteristic as a crime,[296] the division of civil liability into two separate sets of legislation is widely criticised in Spanish legal theory.[297] Apparently there are only historical reasons for the

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292 Castro Rey (2006) p. 5

293 Ley de Enjuiciamiento Criminal, de 14 de septiembre 1882. BOE núm. 260 de 17/09/1882

294 «La ejecución de un hecho descrito por la Ley como delito o falta obliga a reparar, en los términos previstos en las Leyes, los daños y perjuicios por él causados.» See del Olmo (2007) p. 257-258. Under Norwegian law, these questions will be subject to a separate evaluation. It is however permitted to assess a civil claim in a criminal proceeding, see Section 3 cf. Sections 427 et seq. of the Norwegian Criminal Procedure Act of 30 June 2006.

295 Arts 119 -121 CP. See also Merino-Blanco (2006) p. 143, and Peréz (2007) p. 342

296 Martínez, Manuel Javier Delgado. *La responsabilidad de la Administración derivada de los delitos y faltas cometidos por sus funcionarios o la autoridad.* In: Mágina (Revista universitaria de la UNED) (online). 2001, p. [65]-78. http://www.uned.es/ca-jaen-ubeda/ficheros/magina9/delgado.pdf [1 June 2009] p. 77

297 See Novella, Susana Martínez. *La responsabilidad civil, penal y administrativa de las autoridades y los funcionarios.* In: Cuadernos de derecho local, 2002, p. [75]-96; p. 83 with further references, as well as Asúa González, Clara I. *La Responsabilidad (I).* En: Manual de derecho Civil. II. Derecho de obligaciones. Responsabilidad civil. Teoría general del contrato; Lluis Puig i Ferriol … [et al.]. Madrid, 1996, p. [449]-506, p. 455

existence of two separate systems, but the legislator has not found it necessary to amend this regime.[298]

In the case of the Aegean Sea, the master of the ship and the pilot in charge of ship's entry to the harbour were both found guilty of criminal negligence. In addition, they were declared jointly and severally liable, each of them on a 50% basis, for the losses suffered by third parties as a result of the incident.[299] It was also held that the owner's insurer and the 1971 Fund were directly liable for the caused damage, and that this liability was joint and several.[300] In the inevitable event that the master and the pilot could not satisfy these liabilities, the judgement also declared the subsidiary liability of the owner of the Aegean Sea and the Spanish State as their respective employers.[301] The distribution of liability was interpreted differently by the Spanish State and the 1971 Fund; the main dispute was that they were of different opinions on how much each of them should pay. This led to a cumbersome process, which was finally solved out of court – but not before October 2002.[302]

When criminal proceedings have been opened, the judge will first have to address the criminal aspects, the he or she can move on to the civil claims.[303] For those who do not wish to present their claims under the criminal proceedings, they must wait until the court has given its verdict.[304] This means that the international system of compensation created by the Oil Pollution

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298 Coderch, Pablo Salvador and Carlos Gómez Ligüerre. *Respondeat Superior II. De la responsabilidad por hecho de otro a la responsabilidad de la organización*. In: InDret 02/2002 (online). http://www.indret.com/pdf/088_es.pdf [1 June2009] [Coderch (2002) C] p. 6, Novella (2002) p. 82-83

299 Judgement of 30 April 1996, by the Criminal Court No. 2 of La Coruña (Juzgado de lo Penal número 2 de A Coruña, broadly confirmed by the Third Section of the Court of Appeal of La Coruña on 18 June 1997 (Audiencia Provincional de A Coruña), as cited in Coderch, Pablo Salvador … [et al.]. *Tres transacciones: la industria del tabaco, Microsoft y «Mar Egeo»*. In: InDret 01/2003 (online); http://www.indret.com/pdf/115_es.pdf [1 June 2009], p. 23-24. The development of the legal proceedings has also been documented in English by the 1971 IOPC Fund, see 71/FUND/EXC.55/4 with further references.

300 71/FUND/EXC.55/4 paragraph 4

301 Coderch (2003) p. 23. See also Chapter IV10.4.2.

302 See 71FUND/AC.10/2 which includes the final agreement on the proportion of liabilities, and Coderch (2003) p. 21-26. The main principle of the agreement was that the ship owner, his insurer and the 1971 Fund would provide compensation in accordance with the maximum limitation applicable under the CLC 69 and the 1971 Fund Convention, while the Spanish State would compensate the exceeding claims.

303 Arts 11 cf. 114 LeCrim, cf. Art 40 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil. BOE núm. 7 de 08/01/2000 (the Spanish Dispute Act; LEC). See Coderch (2002) C, p. 6-7

304 There seems to be very few cases in which the injured party has chosen to reserve his civil claim for a subsequent, civil process. A strong incentive to bring the civil claim before the court in a criminal process is that the prosecuting authority of the State, the *Ministerio Fiscal*, undertakes the costs of the process, see Coderch (2006) B, p. 7

Convention will be slowed down whenever the method of assessing the claims for compensation under criminal proceedings is applied.[305] The final outcome did however seem to be in accordance with the Conventions. The owner's insurer and the 71 Fund were held directly liable within the limits established by the CLC 69 and the 1971 Fund Convention, while the only actual Spanish supplement to the compensation regime consisted of the unlimited liability for the State, generated by the fault of the pilot.

Nevertheless, the method of using the particular Spanish criminal procedure to impose civil liability based on the incorporated Conventions is a questionable method. One of the reasons is that the court does not seem to fully respect the international provisions. Even though they applied internal, criminal law when they imposed liability on the master, this was definitely not in accordance with the channelling rules of the CLC 69. Its Article III.4, second clause States that no claim for compensation for pollution damage may be made against the servants or agents of the owner, whether under the Convention or otherwise, and it seems clear that the master should fall within this category. The 1971 IOPC Fund was aware of this breach, but chose not to address it in the Court of Appeal.[306] The reason might have been that the liability of the master was transferred to the owner, and further to the owner's insurer, which is a distribution of liability in accordance with the international regime. Secondly, the liability deriving from the commission of a criminal offence can not be limited, as the rules on limitation pursuant to the CLC 69 only covers the liability of the owner as the liable party in accordance with the Convention.

This means that neither the insurer which eventually covers the liability incurred by the master, nor the State through the vicarious liability for the pilot, has the right to limit its liability. However, even though the judgement did not explicitly say anything about the owner's or the insurers right to limit their liability, the limits pursuant to the CLC 69 has been applied in the execution of the judgement. The liability of the State is not covered by the international rules, and remained unlimited. Another questionable aspect of the judgement was that the court found the 1971 Fund and the owner's insurer jointly and severally liable; even though the liability was based on two different conventions. This is not a direct consequence of the criminal procedure, but the

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[305] Rubio, Juan José Álvarez. *El siniestro de Prestige: realidad jurídica y delimitación de responsabilidades.* En: Análisis del Real Instituto Elcano (ARI) No. 107/2002. http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Terrorismo+Internacional/ARI+107-2002 [1 June 2009]

[306] 71FUND/EXC.55/4, paragraph 4.6

court's interpretation of the international rules clearly conflicts with the limits applying to the liability of each of these parties. A more appropriate solution could have been a proportional division of the liability (pro rata). Again, the 71 Fund was aware of the problem, but did not address it in the appeal.[307]

In relation to the Prestige which sunk in 2002, the final distribution of liability among the potential liable persons is yet to be completed.[308] Nevertheless, the Spanish State has contributed to a quicker process by providing the injured parties with advanced compensation as well as financial aid, grants and subsidies on a solidarity base.[309] Admittedly, these measures partly compensate the delay caused by the criminal procedures. Still, it remains to see if the Spanish courts dealing with the Prestige case will apply a coordinated version of the international and internal legal framework.

10.4 Liability outside the Conventions

10.4.1 *Exhaustive rules on the channelling of liability*

The CLC 92 contains rules on the channelling of liability which protect some, but not all persons other than the owner of a ship from being claimed for compensation. Throughout the analysis carried out in Chapter IV10.3, it is also demonstrated that the Bunkers Convention, which in its original form is silent in this respect, will be supplemented by national provisions whenever applied as a part of Norwegian or Spanish law. An aspect of these channelling rules is that an injured party may claim compensation from one of the protected persons if the damage «resulted from their personal act or omission» and was committed «with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. »[310] The question is however if any person or legal entity *not* mentioned in the channelling rules can be held liable based on general tort law or any other legal basis except the CLC or the Bunkers Convention. An affirmative answer would imply that an

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307 71FUND/EXC.55/4, paragraph 4.2

308 See the preliminary judgment of 18 March 2009 by the Criminal Court (First Instance) of Corcubión in which the court upholds the imputations against the master, the chief engineer and the first mate, but provisionally retires the imputations against the former head of the Ministry of Merchant Marine. His decision to send the Prestige out to sea was considered a «prudent» decision that did not aggravate the risk of pollution. (Auto de 20 de marzo de 2009, Juzgado de Primera Instancia e Instrucción Número Uno, Corcubión (A Coruña), Dilgencias Previas Núm. 960/02)

309 Pulido (2007) p. 159. These measured are presented in Annex I.

310 Art III.4 CLC 92, jf. Sections 193.2 and 185.1 NMC

injured party might be able to evade the liability limits under the Conventions by other means than proving the intent or recklessness of the owner or any of the protected persons.

As for the Bunkers Convention, it must be clear that the Convention as such does not prevent an injured party from seeking compensation from others than the registered owner, bareboat charterer, manager and operator of the ship. Even though some exceptions will apply when the Convention is interpreted within the national context of the Contracting States (at least within Norway and Spain), it follows from a natural reading of the wording and the context of the supplementary provisions that they are only meant to embrace the explicitly mentioned persons. The result is thus that an injured party may present claims against any person besides the ones qualifying as «shipowner», except from the ones protected when applying the incorporated Convention in accordance with the supplements of internal law. Such an interpretation, which means that all parties not explicitly mentioned will be exposed to the claims of the injured party, is also supported by legal literature on the subject.[311]

Nevertheless, the problem at issue does not so much relate to the application of the Bunkers Convention as to the interpretation of the channelling rules under the CLC 92. The question is if an injured party be entitled to present claims for compensation based on internal rules towards all natural or legal persons not explicitly mentioned under these rules for compensation. In accordance with the Vienna Convention on the Law of the Treaties (VLCT), a convention should not only be «interpreted in good faith», but also «in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose. »[312] The political tug of war which often will have been fought out before the adoption of the final text also indicates that one should avoid conclusions based on interpretation by negative implication. By applying these principles of interpretation, it does not seem natural to assume that the list is meant to cover other persons besides the one explicitly mentioned. Even though this is a controversial topic,[313] the

311 See Tsimplis (2005) p. 89-90

312 Art 31.1 VLCT

313 See for instance *In Re Oil Spill By the Amoco Cadiz off the Coast of France on March 16, 1978*, U.S. District Court, Northern District of Illinois, 18 April 1983, as amended July 27 1984, MDL Docket No. 376, available from Westlaw; 1984 WL 304041 (N.D.III.), 20 ERC 2041, 1984 A.M.C. 2123, p. 2190, in which the Court principally found that the CLC 69 would not apply because it did not form part of US law; but if it had, it would not have prevented oil pollution victims from bringing an action in tort outside the CLC against anyone other than the registered owner of the vessel, or his agents or servants. These were the persons protected under the channeling rules of Art III.4 CLC 69. The Court held that «All other parties may be sued and held liable, without limitation, independent of the

prevailing doctrine seems to be the one that interprets the wording according to its ordinary meaning, and thereby accept that the only persons protected under the CLC 92, are the ones explicitly listed.[314] On this background, I will base the further discussion on the interpretation that neither of the Conventions, even when incorporated, impedes the injured party from claiming compensation from any natural or legal persons not explicitly protected.

When the extent of this right first is established, there are no restrictions on the type of bases for liability that a claim against these persons might be founded on. In the following subchapters I will however limit the discussion to two potential bases and subjects of liability. The first is the Directive (EC) 75/442 by which a cargo owner might become liable as a producer of waste. As the provisions of this Directive is applicable in both Norway and Spain respectively as part of the EEA Agreement[315] and through its incorporation in the Spanish Act on Waste 10/1998,[316] it does not represent any particular national measure. This is however the case with the vicarious liability of the State, which will be discussed in Chapter IV10.4.2. The reason for discussing these and not other potential bases for liability such as ordinary culpa, product liability and third party liability of classification societies is that they both are topics of current interest due to their application in the Erika case and the cases of the Aegean Sea/Prestige[317] and that they form part of the national legislation. The national provisions on State liability are additionally founded on two

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CLC». However, in the case *Reino de España v. American Bureau of Shipping, Inc*, S.D.N.Y. (district court's opinion), 2 Januar 2008, available from Westlaw; F.Supp.2d --, 2008 WL 36797 (S.D.N.Y), the Court found that the channeling provisions of the CLC 92 were applicable to classification societies. It was stated that «The undisputed factual record [ABS was retained by the owner of the Prestige to perform surveys to determine whether Prestige complied with class rules and applicable statutes] (…) clearly indicates that ABS is a person who, without being a member of the crew, performed services for the Prestige within the meaning of CLC Article III(4)», see *4. This opinion is currently on appeal to the US Court of Appeals for the Second Circuit, see Foley (2008) p. 47 (footnote 42). Nevertheless, in the judgment given by the Tribunal de grande instance (T.G.I) Paris, 11éme ch., 4éme sect. in the Erika case on 16 January 2008 (No. 9934895010), the Court denied the classification society RINA any protection under Art III.4 (b) CLC 92 because it did not provide services for the ship by directly participating in the maritime operation, see p. 235. http://www.alain-bensoussan.com/documents/250769.pdf [15 May 2009]

314 See de la Rue (1998) p. 98, Falkanger & Bull (2004) p. 180, Arroyo (2005) p. 758 and García (2006) p. 792, García-Pita y Lastres, José. *Aspectos jurídico-mercantiles de la llamada «responsabilidad civil» por daños, en el siniestro de Prestige.* In: Meilán Gil, José Luís… [et al.]. *Estudios sobre el régimen jurídico de los vertidos de buques en el medio marino*. Cizur Menor (Navarra), 2006. p. [435] – 457, p. 450. Opposite: Gold, Edgar. *Gard handbook on protection of the marine environment*. 3. ed. Arendal, Norway, 2006, p. 564.

315 See Section 1 EEA Act which incorporates the main EEA Agreement. Article 74 of the EEA Agreement embraces Directive (EC) 75/442 which forms part of Annex XX.

316 Ley 10/1998 de residuos, BOE núm. 96 de 22/4/1998.

317 See Chapter IV10.3.1

different types of liability; strict under Spanish law and a combination of culpa and strict liability under Norwegian law.

By applying the criteria of current interest, the liability of classification societies could also have been discussed due to the Spanish State's ongoing recourse action against the American classification society ABS for the costs incurred in relation to the Prestige incident, and the judgment imposing liability on the Italian classification society RINA in the Erika case.[318] However, a thorough discussion of this topic would exceed the limit of this thesis, as it is not particularly connected to the national context provided by the Norwegian and Spanish legal regime. See however the reflections in *Third-Party Liability of Classification Societies – A Comparative Perspective*, by Jürgen Basedow and Wolfgang Wurmnest, in series Hamburg studies on maritime affairs, volume 2; Berlin 2005.[319]

10.4.2 *Liability of the cargo owner as previous holder of waste under Directive (EC) 75/445*

As a consequence of the judgment delivered by the European Court of Justice (ECJ) on 24 June 2008 as a reference for a preliminary ruling[320] the owner of spilled oil cargo may in the future be held liable as the «previous holder » of «waste» under Community law, cf. (EC) Directive 75/442.[321]

The reference[322] to the ECJ concerned the interpretation of the Directive 75/442 on waste, and was made in the course of proceedings between the Commune de Mesquer and Total France SA and Total International Ltd. concerning compensation for the oil pollution damage caused by the sinking of the Erika on 12 December 1999.[323] The heavy fuel oil cargo that had been spilled had also been subject to a sale by Total International Ltd. to an Italian company for use as fuel for electricity production. In order to carry out its contract, Total Int. had purchased the oil from Total France SA, and had chartered Erika to carry it from Dunkirk, France to Milazzo, Italy.[324]

Article 15 of Directive 75/442 refers to terms defined in Article 1, and States that «In accordance with the 'polluter pays' principle, the cost of disposing of

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318 See footnote 313

319 This article is also translated into Spanish, and published as *Responsabilidad de las sociedades de clasificasión frente a terceros en el contexto de los accidents de la navegación*, In: Meilán Gil, José Luís… [et al.]. *Estudios sobre el régimen jurídico de los vertidos de buques en el medio marino*. Cizur Menor (Navarra), 2006. p. [413]–434.

320 Case C-188/07 Commune de Mesquer v Total France SA and Total International Ltd., [2008] ECR 4501, [2008] Lloyd's rep. 672

321 This directive has later been partly amended by Directive 2006/12/EC on waste of 5 April 2006 (OJ 2006 L 114, p. 9) but the relevant provisions in this context remains the same.

322 Made by decision of the French third instance *Cour de Cassation* on 28 March 2007

323 [2008] ECR 4501, paragraph 3, see also paragraphs 24-28

324 Lloyd's rep. 672 p. 672

waste must be borne by/ the holder (…) and/ or the previous holders or the producer of the product from which the waste came. » Pursuant to Article 1, «waste shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard». The term «producer» refers to «anyone whose activities produce waste (original producer) », and «holder» means «the producer of the waste or the natural or legal person who is in possession of it».[325]

The first question submitted to the ECJ; «whether heavy fuel oil sold as a combustible fuel may be classified as waste within the meaning of Article 1(a) of Directive 75/442, »[326] was answered in the negative. However, to the second and third questions, which were related to the classification of heavy fuel oil accidentally spilled at sea and mixed with water and sediment as «waste», and the liability of the producer, seller and charterer as «producers» and «holders» of the oil for the costs of disposing such waste, the court answered affirmatively.[327] The Court held that:

> « (…) hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, where they are no longer capable of being exploited or marketed without prior processing. »[328]

The Court further Stated that even though the oil was carried by a third party at the time of the incident by which the oil eventually was converted to «waste» within the meaning of the Directive, the Directive also provided that

> « (…) certain categories of persons, in this case the 'previous holders' or the 'producer of the product from which the waste came, may in accordance with the 'polluter pays' principle, be responsible fro bearing the cost of disposing of waste. That financial obligation is thus imposed on them because of their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution. »[329]

As a result, it would be possible for a national court of an EU Member State to regard the seller-charterer as a previous holder of the waste in accordance with Article 15 if the necessary causal connection could be established between the actions or omissions of the seller-charterer and the risk of a shipwreck and thus pollution. The contribution to such a risk could, according to the Court, can in

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325 Art 1 Directive 75/442

326 [2008] ECR 4501, paragraph 35

327 ibid. paragraphs 63 and 89 cf. the final ruling.

328 ibid. paragraph 63

329 ibid. paragraph 77

particular consist of the seller-charterer failing to «take measures to prevent such an incident, such as measures concerning the choice of ship».[330]

According to the 1992 Fund, this particular judgment on the possibility to impose liability on the cargo owner will not affect the application of the CLC 92 and the IOPC Funds.[331] It is not clear whether it might be a conflict of substantial rules between the Directive and the channelling rules of the CLC 92, but this was not discussed by the ICJ as they only gave a preliminary ruling of the presented question. They did not evaluate the relationship between the Directive and the CLC 92.

On a different level, even though Directive 75/442 is applicable as both Norwegian and Spanish law,[332] there seems to be a conflict between a cargo owner's liability according to this EU secondary legislation and the Norwegian rules supplementing the channelling rules of the CLC 92 and the Bunkers Convention. According to Section 193.2 c) NMC which supplement the CLC 92 with internal rules on the channelling of liability, as well as Section 185.1 NMC which refers to Section 192.2 in respect of oil spill covered by the Bunkers Convention, an oil pollution victim would be prevented from claiming «an sender shipper, owner or receiver of the cargo» for compensation. Nevertheless, as the Directive is applicable as Norwegian law according to Section 1 of the EEA Act, and provisions adopted to fulfil Norway's obligations pursuant to the EEA Agreement will prevail ordinary legislation in accordance with Section 2 of the Act, it might still be invoked by a third party seeking compensation from the cargo owner under Norwegian law. This result would however imply a restrictive interpretation of the supplementary protection provided by Section 192.2 c) NMC.

10.4.3 *State liability*

A State will often have intervened in the course of action leading towards a maritime incident causing oil pollution damage, and it is not unusual that a question of State liability arises in the wake of such an accident.[333] Examples of such intervention can be the fault of a pilot in charge of the ships' entry to port,[334] the decision to deny a fragile tanker port of refugee and tow it out to

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330 ibid. paragraph 78

331 92Fund/Exc.42/4

332 See footnotes 315 and 316 on page 3/3

333 Castro Rey (2006) p. 3

334 For which the State was subsidiary liable in the case of the Aegean Sea, see Coderch (2003) p. 23.

sea,[335] or the non-appearance of an underwater rock on an official marine chart.[336] One of the central legal bases on which the liability can be established is the State's vicarious liability for its employees.[337]

Under Norwegian law, the State or the Public Authority in question, will be vicariously liable for damage either intentionally - or by the fault or negligence of its employees within the course of employment and during the exercise of the function assigned to the employee, see Section 2-1 SKL. The liability will also cover anonymous or cumulative mistakes, which means that an injured party does not have to appoint the injurious action or omission to a specific person; the condition of fault or neglect is fulfilled if the fault can be ascribed to one or more of the employees.[338] Within the expression «intentionally or by fault or negligence»[339] there is also a reservation that the damage must be unlawful.[340] The crux of the matter usually relies on whether the person acting on behalf of the public authority has acted within the scope of employment, and particularly if he has complied with demands that «reasonably can be expected» of the authority in question. [341] In the evaluation of the latter aspect, one must take into account the general risk of damage being caused as a consequence of the operation or non-operation of the Public Authority in question, its available

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335 In the ongoing case following the sinking of the Prestige, the imputation towards the former head of the Ministry of Merchant Marine was provisionally retired in the preliminary judgement of 18 March 2009, see Auto de 20 de marzo de 2009, Juzgado de Primera Instancia e Instrucción Número Uno, Corcubión (A Coruña), Dilgencias Previas Núm. 960/02, p.13. Even though this decision has not been appealed by the public prosecutor, several others have submitted their notices - among them the master, the chief engineer and the first mate of the Prestige.

336 On 12 May 1976, the tanker Urquiola struck an underwater rock while entering the harbour of La Coruña, which caused it to and ran aground and later explode. Even though the Spanish authorities had been warned about the rocks, they did not appear in the official charts published by the Spanish State. The State incurred direct, civil liability in the recourse action initiated by the tankers' insurance company. See Pulido (2007) p. 165 and Martín, Jordi Carrasco y Oliver García Muñoz. *Naufragio del buque «Isla de Hierro» en el puerto de Málaga. Comentario a la STS, 3ª, 9.4.2002.* In: InDret 01/2003 (online). http://www.indret.com/pdf/124_es.pdf [1 June 2009] (2003) p. 9.

337 See also UNCLOS' rules on the obligation of a State to prevent harm to the marine environment, and the rules on intervention the high sea pursuant to the International Convention Relating to Intervention on the High Sea in Cases of Oil Pollution Casualties (1969). A brief evaluation of the potential applicability of these rules on the Prestige case can be found in Pulido (2007) pp. 163-164. It must however be noted that the observations of the author is only a suggestion, and has so far not been sustained by the Spanish court.

338 This is a principle developed through case law; see Lødrup (2004) with further references.

339 «forsettlig eller uaktsomt», cf. Section 2-1.1 SKL

340 Nygaard (2000) p. 233

341 Section 2-1.1 SKL

economical resources, the type of damage caused and the possibility of the injured party to take out insurance to cover such damage.[342]

In contrast to the Norwegian system, there are two sets of rules *particularly* governing the Spanish State's vicarious liability for extra-contractual damage;[343] the strict civil/administrative liability[344] and the subsidiary civil liability for damage arising out of the commission of a criminal offence.[345] In regard of the administrative liability, the rule is that a Public Authority may incur strict and direct liability for damage caused to a third party if the damage or injury inflicts with the injured party's individual rights or property, and the he or she did not have the legal duty to endure such damage.[346] The damage must have been *caused* by an action or omission performed within the scope of employment, and not by force majeure. Neither can it result from the daily risks of life.[347] The scope of employment does however embrace both the normal and the abnormal operation of the public services; a term widely interpreted so to cover all sections of the Public Authorities and all kinds of actions and omissions.[348] In order to separate the types of actions that gives rise to liability and those that will not in regard of the strict liability pursuant to LRJAP, the court will often resort to the question of causal connection between the act or omission and the damage, or whether the damage must be considered as a result of the daily risks

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342 See Rt-2000-253 «Signpost» p. 265, cf. Rt-1970-1154 «Tirranna». It has traditionally been maintained that a particular, mild culpa standard applies to the service aspect of work performed by the Public Authorities, see Hagstrøm, Viggo. *Offentligrettslig erstatningsansvar*. Oslo, 1987 p. 391-397 and Lødrup (1999) p. 186-190. This point of view has recently met some criticism, see Liisberg, Bent. *Erstatningsansvaret for offentlig servicevirksomhet. Kritikk av en juridisk vranglære*. Bergen, 2005, pp. 667-670.

343 A third set governs the vicarious liability of private employers, see Article 1903.4 CC. The vicarious liability of other persons is governed by Articles 1903-1910 CC.

344 Arts 139 et seq. LRJAP (Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. BOE núm. 285 de 27/11/2002)

345 Arts 109 cf. 121 CP. See also Art 146 LRJAP.

346 Art 140 LRJAP. See Treviiano, Ernesto García. Sinopsis artículo 106 de la Constitución española (online). Diciembre 2003. http://narros.congreso.es/constitucion/constitucion/indice/index.htm [1 June 2009]

347 See for instance STS 29/10/1998 in which a young girl drowned after jumping off a breakwater. As there were no signs marking the place as dangerous, her mother invoked administrative liability on the part the municipality. The Spanish Supreme Court found that the municipality could not be liable as a result of the fact that the sea always will constitute a risk, and that it would be impossible to place warning signs along the entire coast.

348 Novella (2002) p. 77

of life.[349] According to some Spanish scholars, recent judgments from the Spanish Supreme Court indicate that the Court do not only consider these aspects, but also whether the employee has complied with the type of conduct that reasonably can be expected of the Public Authority in question.[350] This has been interpreted as an introduction of fault into the scheme of strict liability.[351] Pursuant to Article 121 cf. Article 109 CP, the corresponding Public Administration may also incur (subsidiary) liability for any damage resulting from a crime caused by fault, negligence or intent within the scope of the perpetrator's position or functions as an employee.[352]

Through a comparison of the national case law on the subject, it becomes clear that the Spanish State has incurred liability for damage caused by the non-appearance of underwater obstacles on a marine chart and the fault of a pilot,[353] while the Norwegian State has yet to incur liability for similar scenarios.[354] However, as the case law supporting this assertion dates back to the 1960's, and the Swedish State was imposed liability for an oil spill caused by the non-appearance of a shoal on a marine chart in 1983,[355] the situation might be another in the future. It will all depend on the negligence of the State, in terms of whether the action in question reasonably could have been expected to be carried out differently.[356]

In accordance with the current channelling rules,[357] a pilot will be one of the persons explicitly exempted from liability under the incorporated CLC 92 in both Norway and Spain,[358] and also

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349 See Coderch, Pablo Salvador and Antonio Fernández Crende. *Causalidad y reponsabilidad*, 3.ed. In: InDret 1/2006 (online). http://www.indret.com/pdf/329_es.pdf [1 June 2009] [Coderch (2006) A] p. 11-12 with further references to case law.

350 See for instance STS 09/05/2002 «Isla de Hierro», STS 24/07/2001 «Guardia Civil» and STS 16/02/1999 «Rebound ball».

351 Martín (2003) p. 7 and Coderch (2002) B with further references

352 See Pérez (2007) p. 358 with further reference to judgments of the «Sala Penal» of the Supreme Court.

353 In connection with the shipwreck of Urquiola (1976) and Aegean Sea (1992); see footnotes 334 and 336, as well as Chapter IV10.3.1. See also Pulido (2007) p. 165, Martín (2003) p. 9 and Coderch (2003) p. 23.

354 See Rt-1963-622 «Prince Charles» and Rt-1965-1335 in regard of the Norwegian State's repudiation of liability for a pilot's fault. The Norwegian Supreme court did in both cases ascribe the fault to the shipowner (reder – se footnote 262 on p. 3) as the current employer. As for the question of liability for the non-appearance of obstacles on marine charts, see Rt-1966-351 in which the Court found that the State could not be blamed for not knowing about the shoal in question.

355 Nordiske Domme i Sjøfartsanliggender ND-1983-1/ Swedish Supreme Court NJA 1983-1

356 Section 2-1.1 SKL

357 In contrast to the expression «servants or agents of the owner» under Art III.4 CLC 69

358 Art 4 b CLC 92 cf. Sections 192.2 b)NMC

in respect of bunker oil spill from a non-tanker if the question is to be solved by the application of Norwegian law.[359]

Nevertheless, based on the presumption that the rule on State liability provided by Articles 139 et seq. LRJAP does not require the presence of fault of negligence while this is a minimum requirement under the corresponding Norwegian rule in Section 2-1 SKL, it seems like an oil pollution victim might have a better chance of obtaining compensation from the State under Spanish law.

10.5 Limitation of liability

Under the CLC 92 and the LLMC 76/96 (in relation to claims subject to the Bunkers Convention), the ship owner will usually be entitled to constitute a fund[360] in order to limit his liability to an amount calculated on the basis of the tonnage of his ship. Even though this means that the injured party may not get full compensation for his loss, limitation will in most cases be justified if the limits are high enough to cover the loss, and because of the no-fault, strict liability imposed on the ship owner.[361] It must also be noted that for pollution damage caused by tankers, the compensation from the IOPC Funds comes on top of the fund established by the owner. Even though history has proved that the limits have been to low on many occasions, the 2000 Amendments to the CLC 92 and the 1992 Fund Convention, as well as the entry in force of the 2003 Supplementary Fund Protocol, are measures that drastically have raised the amount of funds available to parties who have suffered losses because of the oil pollution.

Nevertheless, this does not apply to the third party victims of bunker oil spill from non-tankers. There are no supplementary tiers to the Bunkers Convention, so the funds available from the owner's insurer or the other people qualifying as owner must cover all the damage caused by the spill.

The CLC 92 provides its own liability limits,[362] while the Bunkers Convention refers to «any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended [by the Protocol of 1996 to amend the Convention on limitation of liability for

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359 Sections 185.1 cf. 192.2 NMC

360 Art V.3 CLC 92, Art 11 LLMC 76/96, directly applicable in Spanish law, and implemented into Norwegian law through Sections 185.2 cf. 177 and 195.1 NMC

361 Carballo Calero (2006) p. 502

362 Art V.1 CLC 92

maritime claims, 1976] ».[363] The only reason for which the ship owner cannot limit his liability under the CLC 92 is if the pollution damage resulted from «his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result».[364] When it comes to the liability established under the Bunkers Convention, the limitation rules depends on the selected regime. If the LLMC 76/96 was to be chosen, the conduct barring the limitation would be the same as in the CLC 92.[365]

As for the rules on limitation under the CLC 92, both Norway and Spain have implemented and incorporated these in accordance with the Convention.[366] This means that applicable liability limits under the CLC 92 are 4, 51 million SDR[367] for a ship not exceeding 5 000 units of tonnage, while the owner or insurer of a ship exceeding this tonnage will be subject to a limit of 4, 52 million SDR plus 631 for each additional unit of tonnage. However, liability under the CLC 92 will never exceed the total sum of 89, 77 million SDR.[368]

In relation to the Bunkers Convention, the LLMC 76/96 has been chosen as the corresponding limitation regime under both Norwegian and Spanish law.[369] Since the LLMC 76/96 is a general convention on the limitation of maritime claims, it also contains particular limits on maritime claims relating to death and personal injury. These limits will not be applicable to claims under the Bunkers Convention, as such damage lies outside the scope of compensatory «pollution damage». The applicable liability limits are the ones pursuant to Article 6.1 (b) of the LLMC 76/96:

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363 Art 6 Bunkers Convention

364 Art V.2 CLC 92. In the wake of the Hebei Spirit oil spill (Republic of Korea, 2007), there is currently an ongoing case related to the deprivation of the owner of the crane barge and the towing tugs, Samsung Heavy Industries, the right to limit it's liability because of negligence. See 92FUND/EXC.44/7.

365 Art 4 LLMC 76/96

366 See Section 194 NMC and the Spanish instrument of adhesion to the CLC 92 published in BOE núm 225 de 20/9/1995 which respectively implements and incorporates the liability limits and the conducts that will prevent limitation under the CLC 92.

367 Special Drawing Right as defined by the International Monetary Fund. According to Art 9 (a) of the CLC 92, the amount shall be converted into national currency on the basis of the value of that currency by reference to the SDR on the date of the constitution of the limitation fund.

368 Art V.1 CLC 92. These are the limits according to the 2000 Amendment, and will apply to incidents occurring after 1 November 2003, cf the resolution pursuant to Art 15.4 CLC 92 of the IMO Legal Committee on 23 October 2000, see IMO Doc Leg.1(82).

369 Section 185.2 NMC refers to Chapter 9 of the NMC, which implements and supplies the LLMC 76/96. As for the Spanish legislation, the choice is expressed in R.D. 1795/2008 of 3 November on the coverage of the civil liability under the Bunkers Convention

« (i) 1 million [SDR] for a ship with a tonnage not exceeding 2000 tons,

(ii) for a ship with a tonnage in excess thereof, the following amount in addition that mentioned in (i):
for each ton from 20001 to 30 000 tons, 400 [SDR]
for each ton from 30 001 to 70 000 tons, 300 [SDR]
for each ton in excess of 70 000 tons, 200 [SDR].»[370]

With this said, it can be Stated that the international liability limits *as such* do not represent any national difference in relation to an injured party's right to compensation under Norwegian and Spanish law. However, the same conclusion cannot be made in relation to the types of pollution damage subject to limitation under the extern limitation regime of the Bunkers Convention. In contrast to the particular liability limits of the CLC 92, which will apply to all claims reckoned to be compensatory under the Convention, the owner's right to limit his liability for bunker oil pollution claims under the LLMC 76/96 depends on whether or not each of these claims are subject to limitation under the external Convention. This problem arises because the LLMC 76/96 does not provide any general right of limitation for bunker oil pollution claims. Such claims might take different forms, and only those falling within the scope of Article 2.1 will be subject to limitation.[371] Yet another aspect that might cause a difference in the amount of total funding available to injured third parties, is that even though claims relating to clean-up operations may be subject to limitation under Article 2.1 (d) and (e),[372] the LLMC 76/96 allows its Contracting States to regulate the liability limits for such wreck removal claims under national law.[373] Both Norway and Spain has taken this opportunity.[374]

In relation to the bunker oil pollution clams subject to liability under the LLMC 76/96, the uncertainty is in particular related to pure, economic loss. The question is if Article 2.1 LLMC 76/96 includes pure economic loss in the sense of loss of earnings caused by the contamination of the environment if the injured party has not sustained any physical damage to his or her property.[375]

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370 Art 6.1 (b) LLMC 76/96, see Section 175.3 NMC.

371 de la Rue (1998) p. 271

372 See Ot.prp.nr.77 (2006-2007) Om lov om endringer i lov 24. juni 1994 nr. 39 om sjøfarten (sjøloven) og om samtykke til ratifikasjon av den internasjonale konvensjon 2001 om erstatningsansvar for bunkersoljesølskade, p. 17

373 Art 18.1 of the LLMC 76/96

374 Declarations on the excluding of the application of Art 2.1 (d) and (e) LLMC 76/96 was presented by Norway on 28 June 2002, se IMO doc LLMC/Circ.42 of 31 August 2002, and by Spain on 10 January 2005, se IMO doc LLMC.3/Circ.11 of 30 March 2005.

375 Zhu (2007) p. 156, Tsimplis (2005) p. 99; see also Colin de la Rue and Peter Murray. *Oil Pollution from Ships – current legal issues.* Discourse given at Shanghai International Maritime Forum, 5 July 2005. [de la Rue 2005] http://www.ukpandi.com/

The answer depends on the interpretation of the wording in Article 2.1 (c), or more accurate whether pure economic loss qualifies as an «infringement of rights other than contractual rights. » This again depends on the national interpretation. As for Norway and Spain, the interpretation will probably include pure economic loss, as such loss in general is considered compensatory whenever there is a sufficient causal connection between the loss and the injurious action.[376]

Nevertheless, a clear difference is created through the national regulation of claims subject to Article 2.1 (d) LLMC 76/96, which most probably involve claims for costs incurred through the undertaking of clean-up operations. While the Norwegian legislator opted for applying particular limits of liability to such claims under the LLMC 76/96,[377] the Spanish legislator has decided that they shall not be subject to limitation at all.[378] As the State often will be the entity that covers most of these costs,[379] the most vulnerable injured parties, such as fishermen and hoteliers, will not be affected by this difference. When Section 175 a NMC was adopted in 2005, the Ministry of Justice and the Police considered the limits as high enough to cover all incurred costs in relation to wreck removal and clean-up operations.[380] However, already three years later, on December 5 2008, the Norwegian government submitted a bill to Parliament proposing to double the limitation amounts for liability for wreck removal and other clean-up costs related to maritime incidents when the ship in question has a tonnage larger than 2000.[381] As of 1 June 2009, no amendments have been made.

Yet another question is the insurance coverage of these costs. The Bunkers Convention only obliges the registered owner to take out an insurance that

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ukpandi/Infopool.nsf/HTML/F81A0FF641364E0D802570360063D24E?Open&Highlight=2,de%20la%20rue [1 June 2009]

376 Lødrup (1999) p. 353, Ponce de Léon (1999) pp. 314, 322.

377 Art 172 a, cf. Art 175 a NMC. This exception only applies to ships with a tonnage larger than 300, cf. Art 72 a. If the ship is smaller, the ordinary liability limits pursuant to LLMC 76/96 will apply, see Art 172.1 NMC. This solution is commented on in Ot.prp.nr.79 (2004-2005) p. 23-26.

378 See the Instrument of Adhesion to the 1996 Protocol to the LLMC 76, BOE No. 50 de 28/02/2005

379 See NOU 2002:15 p. 28. This was also the case in the Prestige incident, see 92FUND/EXC.44/4 paragraph 4.1.1.

380 Ot.prp.nr.79 (2004-2005) p. 23

381 Ot.prp.nr. 16 (2008-2009). The amendment has been proposed following a maritime incident on January 12 2007, in which the bulk carrier Server grounded off Fedje in Hordaland, Norway and consequently broke apart. The governments clean-up costs have been estimated to be just below the current limitation amount, and has demonstrated that the liability limits pursuant to Section 175 a might be to low.

shall cover an amount «not exceeding» the liability calculated in accordance with the LLMC 76/96.[382] This problem lies on the verge on the topic of this thesis, but will be briefly discussed below.

10.6 Mandatory insurance coverage and direct action

Both the CLC 92 and the Bunkers Convention contains provision obliging the registered owner of a ship of a certain size to take out sufficient insurance to cover their liability under the Conventions.[383] Each ship within this category must also be in possession of a certificate attesting that this insurance or financial security is in force in accordance with the Conventions.[384]

Even though the Bunkers Convention does not apply to pollution damage as defined in CLC 92,[385] the exclusion of such tankers is not expressed in the definition of «ship» in Article 1.1. The result is that the wording of Article 7.2 cf. 7.5, which States that «each ship» shall carry such certification, implies that even oil tankers subject to the CLC 92 must be in possession of an insurance certificate in accordance with the Bunkers Convention. This rule has not come to expression under Norwegian law, as Section 183.3 excludes ships embraced by the CLC 92 from the definition of a «ship» under incorporated rules of the Bunkers Convention. According to Ot.prp.nr.16 (2008-2009),[386] neither the Government nor the legislator was aware of this deviation, and a bill proposing to amend Section 183 so that the definition does not exclude tankers has been submitted to the Parliament. The exclusion of tankers subject to the incorporated provisions of CLC 92 from the application of Chapter 10.I NMC will appear in a separate provision.[387]

The CLC 92 and the Bunkers Convention also provide all injured third parties with the right of *direct action* against the insurance company.[388] This is a feature that facilitates prompt and adequate disbursement of compensation.

While the CLC requires the owner of an oil tanker registered in a Contracting State and carrying more than 2 000 tons in bulk as cargo to take out insurance, usually in an P&I Club,[389] the same requisition applies to the registered owner of a non-tanker registered in a Contracting State if the ship has a gross tonnage greater than 1000. Each insured ship shall be in possession of a certificate attesting that insurance of financial security is in force in accordance with the

382 Art 7.1 Bunkers Convention
383 Art VII.1 CLC 92, Art 7.1 Bunkers Convention
384 Art VII.2 cf. Art VII.4 CLC 92, Art 7.2 cf. Art 7.5 Bunkers Convention
385 Art 4.1 Bunkers Convention
386 Ot.prp.nr.16 (2008-2009) paragraph 3
387 Ot.prp.nr.16 (2008-2009) paragraph 3
388 Art VII.8 CLC 92, Art 7.10 Bunkers Convention
389 Falkanger & Bull (2004) p. 182

Conventions.[390] Under the Bunkers Convention, the owner's insurance represents the only guaranteed source for compensation, as no supplementary fund will be available. The only defences that might be invoked by the insurer are the reasons for which the owner himself would have been exempted from liability[391] other than bankruptcy or winding up of the owner, as well as the wilful misconduct of the owner. Nevertheless, the insurer will never be liable for a higher sum than provided by the corresponding limits of limitation. Even if the owner have acted in a way that deprive him of the right to limit his liability under these rules, the insurer's right to limitation remains intact.[392]

An insurance regime in accordance with the one established in the Conventions is established under Norwegian law through Sections 186-188 and 197-200 NMC, and further developed through the Regulation on insurance and financial security for oil pollution liability under the Bunkers Convention and the CLC 92 of 17 June 2008 No. 607.[393]

In Spanish law, the international provisions will be directly applicable as incorporated rules, and the insurance regime is further developed through two separate regulations; the R.D. 1795/2008 on the coverage of bunker oil liability, and R.D. 1892/ 2004 on the national execution of the CLC 92.[394]

Even though many interesting problems of discussion can be addressed within the field of compulsory insurance and certificates,[395] the principal problem in relation to an injured party's right to compensation concerns their right to direct action against the insurer for oil pollution claims outside the scope of the Conventions. These claims can be divided into two groups. The first group embraces claims subject to limitation under Article 2.1 (d) and (e) LLMC 76/96, as both Norway and Spain has reserved the right to regulate the limitation of costs incurred through wreck removal and clean-up operations of bunker oil from non tankers.[396] The second group relates to oil pollution claims falling outside the scope of the Conventions. The question is whether the

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390 Art VII.2 CLC 92, Art 7.2 Bunkers Convention

391 Art III.2 and III.3 CLC 92, Art 3.3 and 3.4 Bunkers Convention

392 Art VII.8 CLC 92, Art 7.10 Bunkers Convention

393 Forskrift om forsikring og annen sikkerhet for oljesølsansvar for skip etter Bunkerskonvensjonen 2001 og ansvarskonvensjonen 1992 of 17 June 2008 No. 607, adopted in accordance with Sections 186.4 and 198 NMC.

394 BOE núm. 226 de 18/9/2004. This R.D. has later been amended in order to correspond better to the rules of R.D. 1795/2008, see the R.D. 1795/2008, first final disposition.

395 For instance that it is only the registered owner, and not the other liable persons under the Bunkers Convention who is required to maintain a mandatory insurance; and whether the right to check relevant certificates in the territorial sea is prevented by the right to innocent passage pursuant to Art 17 UNCLOS.

396 See the previous Chapter on the limitation of liability (IV10.5)

national legislation provides the injured party with a right of direct action against the insurer in these cases.

Under Norwegian law, it is assumed that the costs of bunker oil clean-up operations that exceeds the maximum limit of the LLMC 76/96 because of their particular regulation in Sections 175a cf. 172a, will be covered by the ship's ordinary P&I insurance.[397] This presumption seems to be in accordance with the conditions of the two significant P&I Clubs Gard and Skuld.[398] Due to the cooperation between the members of the International Group of P&I Clubs, the scope of coverage for wreck removal liability under P&I insurance is similar in all major P&I clubs.[399] The Norwegian legislator has also extended the rules on direct action under the implemented provision of the Bunkers Convention to the part of the claim exceeding the mandatory insurance coverage under the Bunkers Convention.[400] In the preparatory works it is Stated that this is considered to be an interpretation in accordance with the wording of Article 7.10 of the Bunkers Convention, which provides that «*any* claim for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage».[401] However, the conditions of insurance provided by the P&I Clubs will normally constitute a bar to this right of direct action through the «pay to be paid»-rule.[402] This rule implies that the assured will not be entitled to be paid by the Club until he himself has made payment to the third party,[403] and will consequently also prevent claimants from presenting their claim directly against the insurer.[404] Nevertheless; the right of direct action is also the general principle under Sections 7-6.1 cf. 7-7 of the Norwegian Insurance Contracts Act (FAL).[405] Even though it is possible to contract out of this rule if the insurance relates to commercial activities concerning ships required to be registered according to the NMC, see Section 1-3.2 (c) FAL, the rule of direct

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397 Ot.prp.nr.77 (2006-2007) p. 17

398 Gard Rule 40 and SKULD Rule 15 provides that the raising, removal, destruction and marking of a ship, or the wreck of a ship or parts thereof are covered by the insurance, provided that such costs are legally recoverable from the owner of the ship.

399 Falkanger & Bull (2004) p. 502

400 Section 188.3 NMC

401 Ot.prp.nr.77 (2006-2007) p. 17

402 See Gard Rule 87.1 and SKULD Rule 28.5.1

403 Zhu (2007) p. 181, Carballo-Calero (2006) p. 515, Arroyo (2005) p. 630

404 This problem will not arise in relation to the right of direct action pursuant to the CLC 92 and the Bunkers Convention for claims within the corresponding liability limits, see Carballo-Calero (2006) p. 517

405 Forsikringsavtaleloven av 16. juni 1989 nr. 69 (FAL). See Falkanger & Bull (2004) p. 506

action would in any case apply should the assured be insolvent, cf. Section 7-8.2. This rule is compulsory, and may not be deviated to the detriment of the injured party, cf. Section 7-8.3.[406] As a consequence, the «pay to be paid»-rule cannot be invoked under Norwegian law.[407] A prerequisite for these rules to apply is however that Norwegian law can be applied pursuant to rules on choice of law.[408] This would also be the solution for the second group in terms of claims related to oil pollution damage falling outside the scope of the Conventions.

Under Spanish law, direct action against the insurer is also the general principle pursuant to Article 76 of the Spanish Insurance Contracts Act (LCS).[409] According to Article 2 LCS this is also a mandatory rule unless other wise is expressed. There are no particular rules on the coverage of the unlimited liability for costs incurred through bunker oil clean-up operations exceeding the ordinary limit of liability pursuant to the LLMC 76/96.[410] In result, the P&I Club providing insurance for the owner will be bound to compensate the entire amount, as there is usually no limitation on such insurance.[411] It is the risk as such that is insured.[412] The right to direct action will however depend on the applicability of Spanish law – or any other national law allowing this concept.

10.7 Compensation from the IOPC Funds

Due to the limited liability of the ship owner and his insurer, their contribution might not cover the cost of compensating all the damage caused by the oil spill. In the case of an oil spill caused by bunker oil from a non-tanker, the injured parties themselves will have to cover the remaining costs.[413] However, for pollution damage caused by oil from a tanker within the meaning of Art I.1

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406 Falkanger & Bull (2004) p. 507

407 Falkanger & Bull (2004) p. 505

408 See ND-2002-306/ Rt-2001-180 «Leros Strength»

409 Ley 50/1980 de Contrato de Seguro (LCS), de 8 de octubre, BOE núm. 250 de 17/10/1980. See Arroyo (2005) p. 630. The LCS supplies the general rules on marine insurance pursuant to the Commercial Code (Código de Comercio 1885), Book III, Title III, 3rd Section, see the *doctrina jurisprudencial* reiterated in STS 03/07/2003.

410 R.D. 1795/2008 does not supply the Bunkers Convention in any way in this respect, as Art 1.1 only repeats the content of Art 7.1 of the Convention.

411 Some limits will usually apply in relation to the liability for oil pollution damage and overspill costs of a catastrophe claim; see Falkanger & Bull (2004) p. 503 with reference to Gard Rules 53 and 51B.

412 Arroyo (2005) p. 628

413 Note that the liability limit for costs incurred in relation to the clean-up operation and thus subject to limitation under Art 2.1 (d) and (e) LLMC 76/96 may be governed by more restrictive internal rules such as under Norwegian and Spanish law. See Chapter IV10.5.

CLC 92, the funds available under the CLC 92 will only constitute the first layer of three.

Just as the CLC, the question whether the 1992 Fund Convention and/ or the 2003 Supplementary Fund Protocol apply to a claim will primarily depend on whether pollution damage has been sustained in a Contracting State and on each claim's fulfilment of requisitions concerning scope of application and compensatory losses.[414] The claims will usually be assessed by the Fund itself, but in the case of a proceeding before a Norwegian or Spanish court, the prior analysis has shown that the national interpretation of definitions, the geographical limits and the requisitions on the scope of application of the IOPC Conventions seems to correspond to those of the CLC 92. This means that claims for pollution damage or preventive measures will be admissible to the same extent against the IOPC Funds as they are against the owner and his insurer under the CLC 92.[415]

As both Norway and Spain are Contracting States to the IOPC Funds, claimants within these jurisdictions will in principle have the same *right* to compensation from the Funds. Since the 1992 Fund and the 2003 Supplementary Fund are two independent, international organizations, a Contracting State cannot extend their liability beyond the in-court interpretation of the term «pollution damage». However, as both the Norwegian and the Spanish interpretation seem to be in accordance with the international definition, this will not cause any divergence between Norwegian and Spanish injured parties. One issue that perhaps could affect a claimant's *access* to compensation from the Funds, is the delay caused by judicial proceedings. Nevertheless; this is not a difference of a national character. Even though the opening of time-consuming proceedings seems to be the norm in Spain, there is no guarantee that the same thing would not happen in Norway.

Based on these observations, it can be concluded that the Norwegian and Spanish law provides national claimants with the same right to compensation from the IOPC Funds. The amounts of supplementary funding that becomes available to victims in Contracting States, shows that the real difference remains between third parties in States that have ratified the IOPC Funds Conventions and those who have not: In stead of a total amount of 89, 77 million SDR for tanker with a tonnage larger than 14 000 under the CLC 92,[416] the maximum compensation available from the 1992 Fund, included the

414 de la Rue (2009) p. 144

415 de la Rue (2009) p. 144-145

416 Art V.1 CLC 92

amount actually paid by the owner or his insurer under the CLC 92, will be 203 million SDR.[417] For claimants in Contracting States to the 2003 Supplementary Fund Protocol, which includes Norway and Spain, the total amount; including the compensation actually paid under the CLC 92 and the 1992 Fund Convention will come to 750 million SDR.[418]

Even though the IOPC Conventions are identical with the CLC 92 when it comes to the scope of application and compensatory losses, they also contain additional rules on the eligibility of compensatory claims. The 1992 Fund will pay compensation to a claimant if he or she has been «unable to obtain full and adequate compensation» under the CLC 92, and this is due to either (a) «because no liability for the damage arise under the [CLC 92]», (b) because the owner who is liable under CLC 92 is «financially incapable of meeting his obligations in full», and the mandatory, financial security «does not cover or is insufficient to satisfy the claims for compensation for the damage», or (c); «because the damage exceeds the owner's liability under the [CLC 92] (…) or under the terms of any other international Convention (…)».[419] Should the total amount of compensation from the 1992 Fund be insufficient to cover the amount not covered by the owner and his insurer under the CLC 92, or there is a risk that the established claims will exceed the applicable limit of compensation under the 1992 Fund Convention, the 2003 Supplementary Fund will cover the remaining damage, at least up to the total limit of 750 million SDR.[420]

The 1992 Fund may however invoke some defences in order to be exonerated from paying compensation. As the 2003 Supplementary Fund only pays compensation to a claimant who has been unable to obtain full compensation under the 1992 Fund Convention «because the total damage exceeds, or there is a risk that it will exceed the applicable limit of compensation»,[421] the exoneration of the 1992 Fund's obligation to pay compensation will also apply to the 2003 Supplementary Fund. The reasons for why the Funds may be exonerated are in principle the same as the ones that may be invoked by the owner and his insurer under the CLC 92, and includes situations in which the

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417 Art 4.4 1992 Fund Convention. These amounts apply to incidents occurring on or after 1 November 2003, cf the resolution pursuant to Art 33 1992 Fund Convention of the IMO Legal Committee on 23 October 2000; IMO Doc Leg.2(82).

418 Art 4.2 (a) 2003 Supplementary Fund Protocol. The elevation will most probably result in a faster disbursement of the available compensation – at a higher interim percentage, see Art 4.5 of the 1992 Fund Convention.

419 Art 4.1 1992 Fund Convention

420 Art 4.1 2003 Supplementary Fund Protocol

421 Art 4.1 2003 Supplementary Fund Protocol

oil pollution was caused by war risks,[422] by non-commercial State ships[423] and the contributory negligence of the claimants.[424] The Funds will neither incur any obligation to pay compensation if the claimant cannot prove «that the damage resulted from an incident involving one or more *ships*».[425] In relation to damage wholly or partially caused by the claimant's his own «negligence», or resulting from an «act or omission» on his part «done with the intent to cause damage», the scope of the exoneration of the IOPC Funds differ from the one applicable to the owner or his insurer: Even though the Funds in any event may be exonerated «to the extent that the shipowner may have been exonerated» under the corresponding provision of the CLC 92,[426] such exoneration will not apply in regard to «preventive measures».[427]

The competence of national courts in respect of claims against the IOPC Funds will be discussed in Chapter IV10.8.

An aspect worthy of a short comment, even though it lies on the verge of the current topic, is the relationship between the 1992 Fund Convention and the Collision Convention 1910. The problem is that when the wording in Article 4.1 (c) of the 1992 Fund Convention States that the 1992 Fund shall pay compensation if the «damage exceeds the owner's liability (…) under the terms of any other international Convention», it also seems to open up for an unintended exoneration of the ship owner and his insurer if the oil spill resulted from a collision between to ships.[428] This effect is the result of the liability regime under the Collision Convention being based on fault or negligence, and not strict liability like the CLC 02. Spain denounced the Collision Convention 1910 with effect from 19 January 2006,[429] but the convention remains in force under Norwegian law.[430]

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422 Art 4.2 (a) 1992 Fund Convention. Any liability incurring to a State as the owner of a State ships on Government non-commercial service relies entirely on international or domestic rules outside the CLC 92 and the IOPC Funds Conventions. See UNCLOS Art 31, Sections 207.1 cf. 206.3 NMC (domestic Norwegian regulation applying to all State Ships on non-commercial service within the territorial sea and the EEZ) and Art 139 LRJAP (strict liability for damage caused by the Spanish State; a provision that probably will be applicable to Spanish State ships causing oil spill pollution while on Government non-commercial service.). These regulations are further discussed in Chapter IV10.1.2.

423 Art 4.2 (a) 1992 Fund Convention

424 Art 4.3 1992 Fund Convention

425 Art 4.2 (b) 1992 Fund Convention

426 Art III.3 CLC 92

427 Art 4.3 1992 Fund Convention

428 The original idea was probably to refer to the 1957, which was succeeded by the LLMC 76; with an explicit exception for oil pollution damage subject to the CLC, see Art … LLMC 76/96.

429 Denounced by Diplomatic Note of 10 January 2005; BOE núm. 58 de 09/03/2005

430 This problem was also discussed by the Maritime Act Committee in relation to the ratification of the HNS Convention, see NOU 2004: 21 paragraph 3.4.

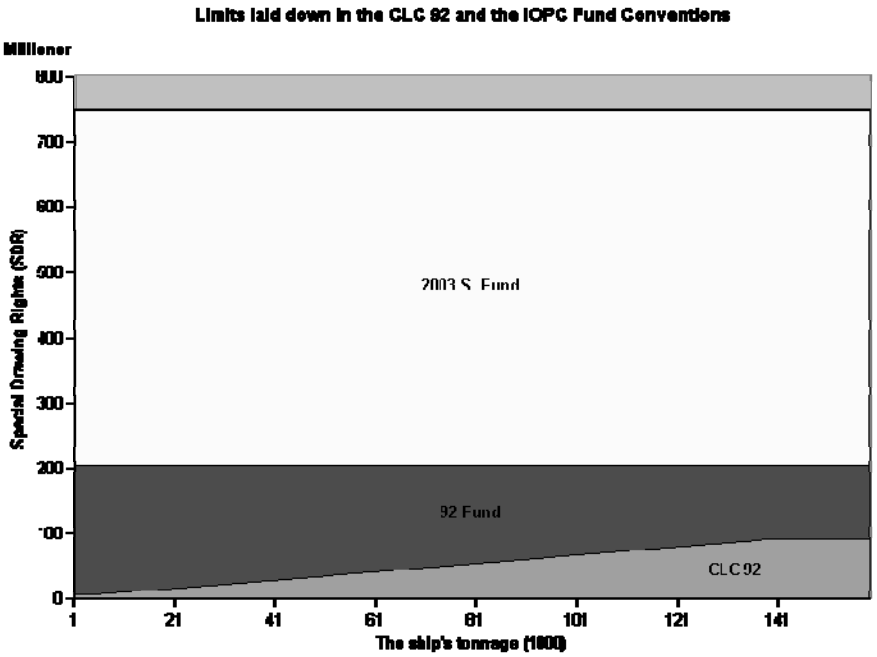

Figure 9.7.1: Three tiers of liability; the CLC 92 and the IOPC Funds Conventions

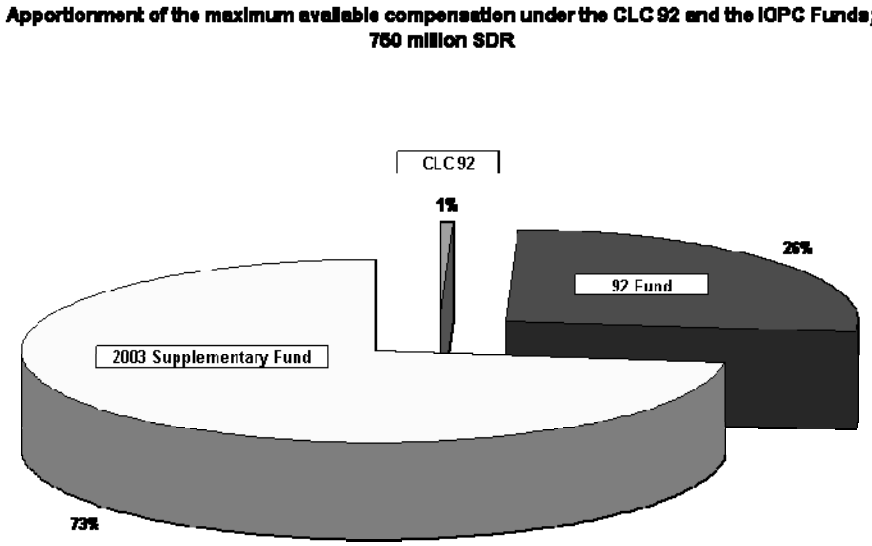

Figure 9.7.2: Apportionment of the maximum available compensation under the CLC 92 and the IOPC Funds Conventions for incidents occurring after 3 March 2005 (the date on which the 2003 Supplementary Fund Protocol entered into force in Norway and Spain)

10.8 Competence of courts

All the Oil Pollution Conventions contain particular rules on jurisdiction as well as on the recognition and enforcement of judgements given in relation to oil spill damage governed by the international regime.

In relation to jurisdictional issues, the Conventions State that actions for compensation under all the Oil Pollution Conventions may only be brought before the courts of one or more Contracting States which have sustained pollution damage within its territory or EEZ, or preventive measures have been taken within this area.[431] When the owner of a tanker subject to the CLC 92 has constituted a limitation fund in accordance with Article V.3, the courts of that State will have exclusive competence to determine all matters relating to the its apportionment and distribution. In relation to action brought before a court in a Contracting State to the CLC 92 which also has ratified the 2003 Supplementary Fund Protocol, this court will have «exclusive jurisdictional competence over any action against the Supplementary Fund for compensation (…) in respect of the same damage. » However, if this State is not a party to the 2003 Supplementary Fund Protocol, any action against the Supplementary Fund «shall at the option of the claimant be brought either before a court of the State where the Supplementary Fund has its headquarters or before any court of a Contracting State to this Protocol competent under article IX of the 1992 Liability Convention [CLC 92] ».[432]

The Conventions also provide rules on recognition and enforcement in relation to legal action taken after a spill covered by the regime. The principal rule is that «a judgement given by a Court with jurisdiction [according to the respective Conventions], which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State.» The judgement will be enforceable in each Contracting State «as soon as the formalities required in [the State of origin] have been complied with. »[433]

The rules on jurisdiction, recognition and enforcement of judgements relating to the Oil Pollution Conventions are implemented in Norwegian law through Sections 203, 294 and 205 NMC, and are in principle directly applicable in Spain. However, this material is also covered by the Brussels Convention of

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431 Art IX.1 CLC 92, Art 9.1 Bunkers Convention, Art 7.1 1992 Fund Convention. A claim made against the 1992 Fund is also regarded as a claim made by the same claimant against the 2003 Supplementary Fund, cf. Art 6.2 2003 Supplementary Fund Protocol

432 Art 7.2, 2003 Supplementary Fund Protocol

433 Art X CLC 92, Art 8 1992 Fund Convention, Art 8 2003 Supplementary Fund Protocol, Art 10 Bunkers Convention.

1968 on International Jurisdiction and Recognition of Decisions in Civil and Commercial Matters (Brussels Convention), its replacement the EC Council Regulation 44/2001[434] (Brussels I Regulation) and the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1988 (Lugano Convention); which is a parallel convention to the Brussels Convention between EC/EFTA States.[435] Both the Conventions and the Regulation contain provisions dealing with the relationship to other conventions concerning jurisdiction and judgements. The difference is however that the Lugano Conventions does not establish any rules on exclusive competence within the EEA,[436] while the Brussels I Regulation – in accordance with the «AETR-doctrine», results in the exclusive competence of the Community in as much as the international provisions affect the rules laid down in the Brussels I Regulation.[437]

If any of the Oil Pollution Conventions should diverge with material within the EEA, it would be in relation to a conflict between substantial rules. For instance, there might be a conflict between the Directive (EC) 75/445 on waste through which the cargo owner might incur liability for oil pollution damage caused during the transport of the goods[438] and the channelling rules in the CLC 92.[439] As this Directive forms part of the EEA Agreement, this substantial conflict might affect States within both the EEA and the EU.

The Brussels I Regulation elaborates on the judicial cooperation in civil matters within the meaning of Art 65 EEC Treaty (Treaty on European Community) and applies in civil and commercial matters whatever the nature of the court or tribunal, cf. its Art 1. According to the «AETR-doctrine» established through a line of cases and opinions of the Court of Justice of the European Communities, beginning with the «AETR judgement»[440], Member States no longer have the

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434 Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1). See also Ringbom, Henrik. *The EU maritime safety policy and international law*. Leiden (Boston) 2008. Martius Nijhoff. Series: Publications on ocean development vol. 64 p. 92 et seq.

435 Merino-Blanco (2006) p. 105

436 Art 57 Lugano Convention.

437 See Council Decisions 2002/762/EC (OJ 2002 L 256, p. 7) and 2004/246/EC (OJ 2004 L 78, p. 22)

438 This is discussed in Chapter IV10.4.2

439 See Chapter IV10.4.2

440 Case 22/70 «AETR» [1971] ECR 263, see paragraph 17-22

right to undertake obligations with non-member countries if such obligations will affect the Community secondary legislation.[441]

In spite of the Community's exclusive competence in the field of jurisdiction, recognition and enforcement of judgements, both the Brussels Convention and the Brussels I regulation implicitly State that a Member State may enter other conventions covering this material; and that these convention will be given precedence if it governs jurisdiction or the recognition or enforcement of judgements in «particular matters».[442]

As long as the rules on jurisdiction in civil matters governing the EU Member States were kept within the Brussels Convention, there was nothing except the condition of «particular matter» preventing the Member States from entering new Conventions containing jurisdictional clauses. Because this was a multilateral convention acceded by State Parties only, its material was kept outside the Community's secondary legislation. However, due to the «AETR-doctrine», this all changed the day the Brussels I Regulation entered into force, on 1 March 2002[443].

When Spain became party to the 1992 Protocols of the CLC and the Fund Convention in 1997, the Community had no exclusive competence, as the acceding dates were prior to 1 March 2002. However, any ratification of the Bunkers Convention and the 2003 Supplementary Fund Protocol on a Member States own initiative would have been inconsistent with the Brussels I Regulation.[444]

The exclusive competence could have been maintained within the EU if the Community as such could ratify the Conventions. As the Conventions were only open to «States»,[445] this was not an alternative. Under the Diplomatic Conference on the adoption of the 1992 Protocol to the CLC 69, Sweden proposed a new provision that would enable the EU to become party to the Convention and hereby solve the lack of competence of the Member States.

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441 See Opinion 1/03 [2006] ECR 1145, especially paragraph 114 et seq. See also Arnesen, Finn and Anneke Biesheuvel Borgli. *Introduksjon til rettskildelæren i EF.* Series: IUSEF No. 2, 3.ed. Oslo, 1995, p. 112 – 114.

442 Art 57 Brussels Convention, Art 71.1 Brussels I Regulation

443 Council Regulation (EC) No 44/2001 Art 76

444 See Jackson, David C. *Enforcement of maritime claims.* In: Lloyds Shipping Law Library, 2005. 4. ed. London LLP, paragraph 6.40

445 Art 12.2 Bunkers Convention, Art 19.2 and 19.3 2003 Supplementary Fund Protocol

The proposal was not adopted.[446] The solution came through two Council Decisions authorising the Member States to sign, ratify and accede the Bunkers Convention and the 2003 Supplementary Fund Protocol «in the interest of the Community».[447]

In relation to the international regime on compensation for oil pollution damage as interpreted within a national context, this seems to be the only aspect in which Spain's membership to the EU may divergence between the Norwegian and Spanish rules.

There is currently an ongoing process within the EU in which it is suggested to establish a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations.[448]

The object of the proposal is «to establish a procedure for the Community to make an assessment of whether there is a sufficient Community interest in the conclusion of proposed bilateral agreements with third countries, and in the absence thereof authorise the Member States to conclude these agreements with third countries in certain fields concerning judicial cooperation in civil and commercial matters falling under the exclusive competence of the Community. »[449] As it is proposed «to limit the procedure in question only to sectoral issues related to matrimonial matters, parental responsibility and maintenance obligations on the one hand, and, on the other hand, to the law applicable to contractual and non-contractual obligations»[450], the adoption will not have direct effect on the jurisdictional rules of the IMO Oil Pollution Conventions. However, if adopted, it might not be too far fetch to consider the enacting of a similar procedure on multilateral treaties with third countries involving rules on jurisdiction and the recognition and enforcement of judgement.

10.9 Limitation of action

The right to compensation is not only limited by rules on the limitation of liability; the time passed without legal action being taken can also prevent an injured party from obtaining compensation.[451] The Oil Pollution Conventions all draw up the same rule, and State that the right to compensation «shall be extinguished unless an action is brought there under within three years from

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446 IMO doc LEG/CONF.12/CW/WP.3. See also Giggs, Patrick. *International Convention on Civil Liability for Bunker Oil Pollution Damage; 2001.* Available from http://www.bmla.org.uk/documents/imo-bunker-convention.htm [1 June 2009]

447 Council Decisions 2002/762/EC (OJ 2002 L 256, p. 7) and 2004/246/EC (OJ 2004 L 78, p. 22)

448 Proposal of 23 December 2008 (COD (2008) 0159)

449 Proposal of 23 December 2008 (COD (2008) 0159) p. 5

450 Proposal of 23 December 2008 (COD (2008) 0159) p. 5

451 García-Pita y Lastres (2006) p. 454

the date when the damage occurred» - or at most «six years from the date of the incident which caused the damage. (…)»[452]

This rule is directly applicable under Spanish law, and implemented in Norwegian law through Section 503 NMC. A difference may however arise between Norwegian and Spanish law when it comes to the injured party's right to claim compensation for oil pollution damage not covered by the CLC 92 or the Bunkers Convention. This difference is caused because the Norwegian regime extends the international rules, including the ones on time bar, to such damage,[453] while the same types of damage would be subject to the general rules of extra-contractual liability under Spanish law. The limitation of action for such claims depends on the applicable basis of liability: In relation to claims subject to the general provision on fault-based liability in Article 1902, and to Art 139 LRJAP on vicarious State liability, the time bar is one year from the date on which the injurious action occurred, or from the day the damage appeared.[454] However; in relation to civil liability arising out of the commission of a criminal offence, the principal rule is that such claims are subject to a time bar of 15 years.[455]

This means that pollution damage not covered by the Oil Pollution Conventions will be subject to a time bar of three years from the date when the damage or occurred, or at most six years from the date of the incident which caused the damage under Norwegian law, while it will be extinguished under Spanish law after only one year if the basis of liability is of a purely civil nature, but not before 15 years have passed if the damage is the result of a criminal offence.

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452 Art VIII CLC 92, Art 6 1992 Fund Convention, Art 6 2003 Supplementary Fund Protocol, Art 6 Bunkers Convention

453 Section 503 NMC

454 Art 1968.2 CC and Art 142.5, see also Ponce de León (1999) p. 261

455 Art 1964 CC. See Sánchez, Ricardo Juan. *La responsabilidad civil en el proceso penal (actualizado a la ley de juicios rápidos).* Madrid, 2004 p. 49-57,

V
Conclusive remarks

Throughout this thesis I have compared the Norwegian and Spanish legal regime in relation to the common factor made up by the IMO Oil Pollution Conventions. I have sought to provide consecutive comments on the differences in respect of each of the discussed topics, and at this point I will only draw some final lines. The question is whether, and if so – in what way - the national incorporation and interpretation of the Oil Pollution Conventions cause divergence between the Norwegian and Spanish rules on a third party's right to compensation for oil pollution damage caused by ships.

On one hand the analysis has shown that there is some divergence between the two States in respect of applicable legal method, the connection with the EU, the relation between national and international law in terms of monism and dualism, the status of incorporated, international provisions and the legislative tradition within maritime law. But on the other, it does also imply that the interpretation and application of the Oil Pollution Conventions remains quite the same under both Norwegian and Spanish law. The main divergence between the two legal regimes within this legal area actually seems to be found in relation to the rules governing the right of a third party to claim compensation for oil pollution damage that falls *outside* the scope of the Conventions.

However, there some aspects related to the incorporation and interpretation of the Conventions might cause divergence between the Norwegian and Spanish rules. These include the different hierarchical status of incorporated international provisions within the national legislation, the impact of substantial law on channelling rules and the liability limits of the LLMC 76/96, as well as the Spanish tradition of assessing many of the pollution claims within a criminal process before a domestic court.

In regard of the different hierarchical status, the problem lies in the theoretical risk of the incorporated provisions being derogated by a more recent, national provision covering the same material. This risk is caused within Norwegian law as incorporated provisions are given the same status as their implementing provision, which usually will be an ordinary act of law. Under Spanish law, the problem is avoided through constitutional rules that assigns

incorporated provisions with higher status than ordinary legislation.[456] However - even though an application of the principle of *lex superior* could result in the prevailing of an internal provision at the sacrifice of the incorporated international provision, one must also consider the minimal risk of contradictory provisions as a result of the Norwegian legislator's aim to adopt laws in conformity with the State's international obligations. Another thing is that the incorporated provisions often will provide particular regulation within a limited area, and that the application of the principle of *lex specialis* would give them precedence over any general internal rules.[457]

As for the impact of substantial law on the channelling of liability,[458] the difference is a result of the Norwegian supplementary rules that extends the protection to cover more persons than mentioned under the CLC 92, and also add channelling rules to the Bunkers Convention. Even though there are some Spanish regulations that supplement the Bunkers Convention with channelling rules protecting the persons participating in salvage operations and those taking preventive measures, these are not as extensive as the Norwegian rules, which also cover the «sender, shipper, owner or receiver of the cargo».[459] In consequence, more people are protected against claims for compensation for damage caused by both tankers and non-tankers under Norwegian law.[460] Yet another aspect that could cause divergence in this respect is the applicable, national rules of liability.[461] Even though an injured party could seek compensation outside the Convention in both States, the applicable rules might not facilitate such an action. An example is the rules on vicarious State liability, which require that the damage was caused by fault or negligence under Norwegian law, while the corresponding rule under Spanish law impose strict liability independent of fault.[462] Nevertheless; this difference will only cause diversion if the applicable limits of liability are to low to cover all the damage. If all claims can be settled within the 750 million SDR that is the total amount

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456 See Chapter III9

457 An example is the incorporated provisions of the CLC 92 and the Bunkers Convention over the general rules on liability for pollution damage pursuant to Chapter 8 NPCA. See footnote 142 on p. 3.

458 See Chapter IV10.3

459 See the tables 9.3.1 and 9.3.2

460 See however the short discussion in Chapter IV10.4.2, by which it seems like the Norwegian rules protecting the cargo owner must yield for (EC) Directive 75/445 on waste which may be invoked as a ground for imposing liability to the cargo owner.

461 See Chapter IV10.4

462 See however Chapter IV10.4.3

available under the 2003 Supplementary Fund Protocol, there will be no need to seek compensation elsewhere.

Another difference consist of divergent limits of liability in regard of claims relating to costs of wreck removal and clean-up operations pursuant to Article 2.1 (d) and (e) LLMC 76/96 under Norwegian and Spanish law.[463] While the Norwegian legislator has established particular limits,[464] these claims are not subject to any limitation at all under Spanish law.[465] If the limitation under Norwegian law actually covered all types of clean-up costs this would not be a problem. However, as the current limits provided just enough compensation to cover the costs incurred by the Norwegian Government through the clean up operation in the wake of the shipwreck of the bulk carrier Server in 2007,[466] this might not be the case. Nevertheless; due to a legislative proposal on the elevation of these limits by 50%, it is probable that the situation will change in the near future.[467] It is also clear that the Norwegian legislator did not mean to provide a limit that did not cover the potential costs in the first place.[468] The elevation of the Norwegian limit and the original intention of the legislator are both factors that reflect that the right to compensation for such damage is intended to be the same under both Norwegian and Spanish law. Neither of the tax-payers should have to cover the costs of the polluter.

The third and last aspect that impacts on a third party's right to compensation under the Conventions is the use of time-consuming court proceedings to assess claims that are covered by the Oil Pollution Conventions.[469] One thing is that the Spanish courts earlier have ignored the channelling rules under the CLC 69 and thus imposed an unlimited liability on other parties than the owner, his insurer and the IOPC Funds.[470] Even though such a practise might generate more funding to cover the claims, it is also a threat to the uniformity of the international regime. Besides, if the channelling rules do not prevent such claims, they might be handled independently of the

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463 See Chapter IV10.5

464 Art 172 a, cf. Art 175 a NMC.

465 See the Instrument of Adhesion to the 1996 Protocol to the LLMC 76, BOE núm. 50 de 28/02/2005.

466 Ot.prp.nr. 16 (2008-2009)

467 Ot.prp.nr. 16 (2008-2009), cf. Besl.O.nr.79 (2008-2009) Lov om endringar i lov 24. juni 1994 nr. 39 om sjøfarten (sjøloven) mv.

468 Ot.prp.nr.79 (2004-2005) p. 23

469 See Chapter IV10.3.1.

470 This was the result of the Aegean Sea case in which the State was imposed liability for the actions of the pilot, who probably qualified as a «servant» of the owner, see Art III.4 CLC 69

claims entitled to compensation under the Conventions. However, in relation to a third party's right to compensation, the most important thing is the time consumption resulting from the need to first address the criminal aspects before the court may move on to the civil claims in a criminal procedure.[471] Nevertheless; as a significant incentive behind such procedures seems to be the possibility of obtaining enough compensation to cover all the claims by imposing liability on other parties than the ones liable under the Conventions, this practise might change now that the 2003 Supplementary Fund Protocol is in force and a part of both Norwegian and Spanish law.

Other than these, no aspect of the national legislation seems to affect the interpretation and application of the Conventions as such. This includes the exclusive competence of the EU within the area of jurisdiction, recognition and enforcement of judgments[472] as the Member States are urged to ratify the IMO Conventions,[473] and were given the Council's consent to ratify the Bunkers Convention and the 2003 Supplementary Fund Protocol.[474]

The rest of the differences relate to third parties right to compensation for oil pollution damage falling *outside* the scope of the Conventions. This category includes damage caused on the high sea wherever national tort law is applicable including the continental shelf situated outside the EEZ,[475] damage caused by State ships on Government non-commercial service[476] and damage resulting from the escape or discharge of non-persistent types of oil from an oil tanker.[477] Whether any compensatory damage actually may arise on the high sea or on the part of the continental shelf outside the 200 nautical miles of the EEZ is uncertain. So is the risk of harm of the escape or discharge of non-persistent oil, as this type has been left out of the CLC 92 and the IOPC Fund Conventions due to its tendency to evaporate quickly, without requiring any clean-up operation.[478] However, the exception of liability on the part of a flag State which ship on Government non-commercial service has caused oil pollution damage might be a problem for the injured party who is prevented

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471 Arts 11 cf. 114 LeCrim, cf. Art 40 LEC

472 See Chapter IV10.8

473 See Communication from the Commission to the European Parliament (…) concerning the Common Position of the Council on the adoption of a Directive on the civil liability and financial guarantees of shipowners, COM(2008)846 of 11/12/2008.

474 See Council Decisions 2002/762/EC (OJ 2002 L 256, p. 7) and 2004/246/EC (OJ 2004 L 78, p. 22)

475 Chapter IV10.1.1

476 Chapter IV10.1.2

477 Chapter IV10.1.2

478 See Chapter IV10.1.2

from seeking compensation under the CLC 92 and in some States also the Bunkers Convention.[479] Either way, the problem does not relate to the practicality of these types of damage, but the national legal basis on which a claimant may obtain compensation.

The divergence between Norwegian and Spanish law within this material is mainly a result of the extension of the rules on strict liability, its limitation and compensatory losses under the CLC 92 and the Bunkers Convention to non-covered oil pollution damage caused by the escape or discharge from a tanker or non-tanker under Norwegian law,[480] while the Spanish legislator has opted not to adopt any particular rules that could have supplemented the Conventions in this respect.[481] The liability for such damages will depend on the ordinary provisions on tort law[482] and be subject to the limits provided for in regard of pollution damage from non-tankers. Because of the exception in Art 3 (b) LLMC 76/96, damage caused by tankers will not be subject to limitation at all. However, should the new Spanish Maritime Code be adopted without amendments to its Chapter V,[483] the applicable Spanish legislation will in most cases – except for damage caused by non-commercial State ships, also consist of identical rules as the Conventions in respect of strict liability, compensatory losses, and mandatory insurance.[484] In that case, the difference will lie in the applicable limits of liability, as the Norwegian legislation provides identical limits of liability as provided for in the CLC 92 in respect of pollution damage caused by tankers,[485] while the Spanish regime will operate by the limits pursuant to LLMC 76/96 in regard of damage caused by both tankers and non-tankers.[486] In regard of oil pollution damage caused by State ships on Government non-commercial service, both Norwegian and Spanish rules establish strict liability for the State.[487] Foreign State ships will be subject to the same rules as national ships under Norwegian law, while their liability is not

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479 If the State in question has opted not make the Bunkers Convention applicable to oil pollution damage caused by a non-commercial State ship, see its Art 4.3.

480 Sections 207 and 208 NMC – including compensation for costs incurred as a result of preventive measures. See Chapter IV10.1.1 and Chapter IV10.1.2.

481 See Chapter IV10.1

482 Art 1902 CC, Arts 139 et seq. LRAJP, Arts 109 cf. 119-121 CP

483 See Chapter II7.3

484 Chapter V PLGNM

485 Section 207.2 cf. 194.1 NMC. Claims deriving from pollution damage caused by non-tankers will be subject to the limits in the implemented LLMC 76/96, see Section 208.1 cf. 208.3 NMC.

486 Art 417.2 cf. 421 PLGNM

487 See Sections 190.3, 207.1 cf. 206.3 NMC and Arts 139 et seq. LRJAP

explicitly regulated by Spanish law. The time bar applying to claims not covered by the Oil Pollution Conventions will also differ between the two States. As these claims will be subject to the same limits as the Conventions under Norwegian law - and ordinary limits under Spanish law, legal action must be taken within three years from the date the damage occurred, or at most six from the date of the incident under Norwegian law, and one or fifteen years under Spanish law; depending on whether the damage is of purely civil nature, or the result of a criminal offence.[488]

All in all it can be said that the principle divergence between Norwegian and Spanish rules within this legal area is not caused by the national incorporation and interpretation of the Oil Pollution Conventions, but as a consequence of diverging provisions regulating to the liability for oil pollution damage outside the scope of these Conventions. Yet another aspect is that the importance of the existing differences in regard of a third party's right to compensation under the Conventions most probably will diminish as a result of the elevated limits of liability.

[488] See Chapter IV10.9

Annex I
Spanish measures in the wake of the Prestige

On 30 October 2002, the distribution of liabilities between the Spanish State and the 1971 Fund for the damage caused by the shipwreck of Aegean Sea in the port of La Coruña in 1992 finally found its solution in an out of court agreement.[489]

Then, on 19 November 2002, the tanker Prestige, with a gross tonnage of 42 820 and laden with 76 972 tonnes of heavy fuel oil broke in two 130 miles off the Galician coast in the north-western Spain. When this happened, it had been denied a port of refugee in both Portugal and Spain, and was currently being towed out to the Atlantic Ocean by order of the Spanish Government.[490] Some of the discharged oil leaking from the tanker reached the coast of Galicia/ La Coruña on 16 November, and the following day the City Council of La Coruña imposed a state of emergency, and all fishing activities in the zone were prohibited.[491] The coastline of Galicia is one of the riches fishing areas in Europe, and the fishing bans were to cause widespread economic impact to thousands of people.[492] This was not the first oil spill in the area, but the last of many affecting the rocky shore of «Costa da Morte», or the *Death Coast*. Popular movements wanting compensation and punishment arouse.[493] These might also have been one of the reasons for which criminal proceedings were opened.

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489 See 71FUND/AC.10/2 of 9 January 2003 which includes the final agreement on the proportion of liabilities, and Coderch (2003) p. 21-26. The main principle of the agreement was that the ship owner, his insurer and the 1971 Fund would provide compensation in accordance with the maximum limitation applicable under the CLC 69 and the 1971 Fund Convention, while the The Spanish State would compensate the exceeding claims.

490 92FUND/EXC.44/4 of 27 February 2009, paragraph 2.1, and Pulido (2007) p. 151

491 *Crónica de la catástrofe*. El Mundo (undated) http://www.elmundo.es/especiales/2002/11/ecologia/prestige/cronologia.html [1 June 2009]

492 92FUND/EXC.22/8 of 7 October 2003, paragraph 3.1, Caballero, María Jose. *The Prestige Disaster – One Year On*. Oceans Campaign, Greenpeace Spain, November 2003, p. 21-22. http://www.greenpeace.org/raw/content/international/press/reports/the-prestige-disaster-one-yea.pdf [1 June 2009] and Negro … [et al.]. *Compensating system for damages caused by oil spill pollution: Background for the Prestige assessment damage in Galicia, Spain*. In: Ocean & Coastal Management Vol. 50, Issues 1-2 2007, p. [57]–66. http://www.sciencedirect.com/ [1 June 2009] p. 59

493 Pulido (2007) p. 152

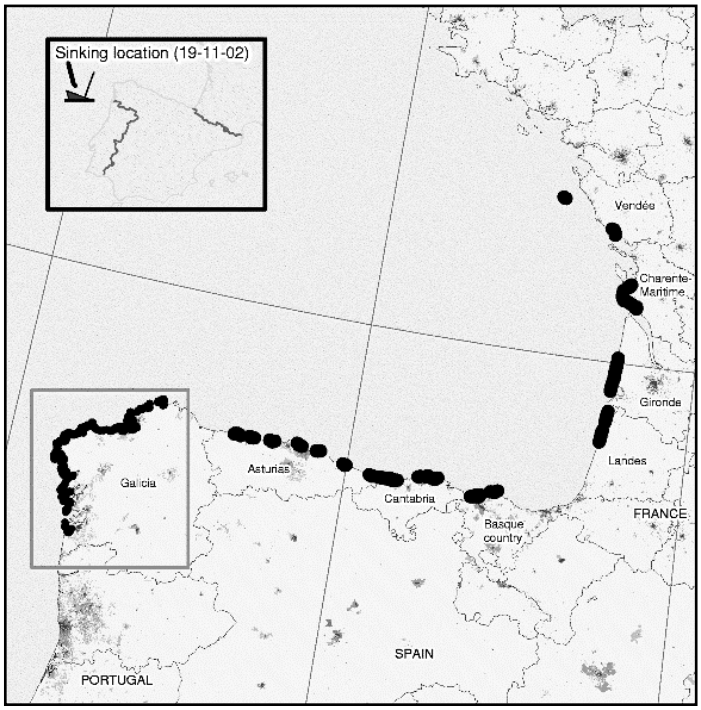

Figure A.1: Spanish areas affected by the Prestige oil spill in November 2002

Source: European Environment Agency[494]

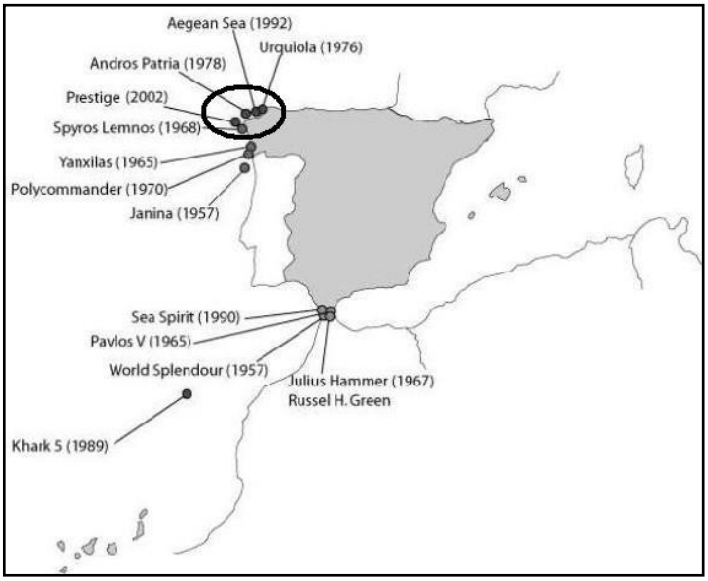

Figure A.2: Major oil spills in Spain

Source: the Spanish Ministry of Environment, Rural and Seaside Areas[495]

494 http://dataservice.eea.europa.eu/atlas/viewdata/viewpub.asp?id=798 [1 June 2009]

495 http://www.mma.es [1 June 2009]

Some early measures were adopted to diminish the negative impacts of the oil spill. On 23 November 2002, the Real Decreto-Ley[496] 7/2002 regarding measures of restorations in relation to the incident of the Prestige was published in BOE.[497] It contained provisions on local tax reduction,[498] labour law measures,[499] Government grants to fishermen, shellfish farmers and others affected by the suspension of activity, the promotion of fish products from the Galician Autonomous Community, as well as preferential lines of credit in anticipation of the reparation or reposition of the infrastructure of the fishing industry.

On 14 December, the scope of R.D.L 7/2002 was extended through the adoption of Real Decreto-Ley 8/2002.[500] In its preamble it was stressed that the R.D.L 7/2002 had been adopted to provide the necessary *urgent* and *immediate* means required to deal with the needs caused by the Prestige incident.[501] Through communication with the 1992 Fund, it also became clear that the Spanish Public Authorities and the Fund agreed on the importance of avoiding the difficulties faced in connection with the Aegean Sea incident.[502] After a slow start, the Government now seemed determent to compensate all damage caused on Spanish grounds by the Prestige incident in a prompt and adequate manner, with or without the help of the ship owner, his insurer and the 1992 Fund. Nevertheless; an important aspect of all the adopted financial measures was

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496 Real Decreto-Leyes (Royal Decree Laws) are temporary, legislative provisions that may be issued «in case of extraordinary and urgent need». Their substantial content may not affect «the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Part 1 [CE], the system of Self-governing Communities, or the general electoral law.», cf. Art 86.1 CE

497 R.D.L 7/2002, de 22 de noviembre, sobre medidas reparadoras en relación con el accidente del buque «Prestige», BOE núm. 281 de 23/11/2002

498 Municipal bodies facing a loss of income because of the tax reduction were to receive compensation through the State budget, see Art 3.3

499 These measures referred to the right of an employer to suspend or terminate contracts of employment, or to reduce the daily working hours based on the classification of the pollution damage as an incident of force majeure, cf. Art 5.1.1. Employers were also granted a waiver of social security contributions, cf. Art 5.1.2. As for the affected employees, the R.D.L. ordered that they would receive payments of unemployment benefits even though they had not worked up sufficient grounds for the general rules on this matter to apply, cf. Art 5.1.3.

500 R.D.L. 8/2002, de 13 de diciembre, por el que se amplían las medidas reparadoras en relación con el accidente del buque «Prestige» a las Comunidades Autónomas del Principado de Asturias, Cantabria y País Vasco, y se modifica el Real Decreto-Ley 7/2002, de 22 de noviembre, BOE núm. 299 de 14 de diciembre de 2002

501 « (…) a fin de articular con la urgencia e inmediatez necesarias las actuaciones precisas para atender las necesidades surgidas de los daños provocados por el citado accidente.»

502 92FUND/EXC.22/8 of 7 October 2003, paragraph 7.3

that the Spanish State did not assume any liability for the damage, but reserved the right to recourse from the liable parties.[503]

In the course of 2003 and 2004, two additional financial measures were adopted; R.D.L 4/2003 of 20 June[504] and the R.D.L. 4/2004 of 2 July[505]. This regime represented three different systems for assessing and paying advance compensation for pollution damage caused within a three-year span beginning the day the oil first started to leak from the Prestige on 13 November 2002, and ending in March 2005. By accepting the terms of the Government, oil pollution victims would be conceded full compensation for their claims as assessed by the State,[506] and thus avoid long legal procedures and the risk of a low percentage disbursement[507] from the 1992 Fund. The assessment of the claims would follow the criteria applied under the CLC 92 and the 1992 Fund Convention.[508] On the other hand; the terms laid down in Article 6 of the R.D.L. 4/2003 included the signing of a settlement agreement with the Spanish State by which the claimant would renounce on any pending or future judicial or extrajudicial action related to disaster caused in relation to the Prestige incident.[509] Another term was that the claimant would have to transfer his rights of compensation to the Spanish Government.[510]

The first system was designed to cover the further loss of profit (lucrum cessans) of those who had received direct assistance under the acts adopted in November 2002 when the incident occurred. Their loss would be assessed by the use of objective estimates.[511] The second system was applicable to the rest of the claims, except claims from the Autonomous Communities and towns as

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503 Art 1.2 R.D.L. 7/2002, Art 1.2 R.D.L. 8/2002 and Art 1.3 R.D.L. 4/2003

504 R.D.L. 4/2003, de 20 de junio, sobre actuaciones para el abono de indemnizaciones en relación con los daños ocasionados por el accidente del buque «Prestige»; BOE núm. 148 de 21 de junio de 2003; further elaborated in R.D. 1053/2003 de 1 de agosto (BOE núm. 184 de 2 de agosto de 2003)

505 R.D.L. 4/2004, de 2 de julio, por el que se adoptan determinadas medidas relacionadas con los daños ocasionados por el accidente del buque «Prestige», BOE núm. 160 de 3 de agosto de 2004; further elaborated in R.D. 276/2005 de 11 de marzo (BOE núm. 61 de 12 de marzo 2005.

506 Art 6.1 a) R.D.L. 4/2003

507 Art 4.5 1992 Fund Convention

508 Art 4 R.D.L. 4/2003

509 Art 6.1 b) R.D.L. 4/2003

510 Art 6.1 c) R.D.L. 4/2003

511 Art 3 R.D.L 4/2003 cf. Art 3.1 R.D. 1053/2003. By October 2004, this system had practically come to an end and involved the payment of approximately 86, 2 million €, cf. 92FUND/EXC/26.8/2 of 12 October 2004 paragraph 3.3.

such which were subject to the third system.[512] The claims falling within this second category would undergo an individual assessment of the suffered damage conducted by the *Consorcio de Compensación de Seguros*; a public corporate entity attached to the Ministry of Economy through the Directorate General of Insurance and Pension Funds, but also a legal entity in its own right with full operational capabilities.[513] The ship owner's insurer (London Club[514]) and the 1992 Fund helped out in the process.[515] When the R.D.L. 4/2003 was adopted in June 2003, it was stated that the global limit would not exceed 160 million €, and that the payment would depend on prior disbursements from the 1992 Fund. These conditions were repealed in R.D.L. 4/2004, and a new limit of 249, 5 million € was established. However, this unlimited funding would only cover damage occurred until 31 December 2003. Damage occurred from 1 January 2004 and until the claims had to be presented on 31 March 2005, would be compensated within a global limit of 3 million €.[516]

The third system provided for the signing of agreements with public administrations different from the central administration; the Autonomous Communities and the City Councils.[517] This system does not seem to have been subject to any form for global limitation.

In a Note by the Director of the 1992 Fund of 27 February 2009,[518] it is accounted for the claimed, assessed and compensated claims from injured third parties in Spain, France and Portugal. By middle February 2009, the total amount of claims submitted to the 1992 found came to a total of 1 134 704 893 €. While only 0, 38 % of the claimed amount derived from Portuguese claims and 9, 67 % from the French, an entire 90 % was made up by Spanish claims.[519] The total amount of compensation available under the CLC 92 and the 1992 Fund was 135 million SDR, which corresponded to 171 520 703 € on 7 February 2003.[520] This corresponded to 15 % of the total amount submitted by all claimants. However, the claims were only assessed to a

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512 «Las comunidades autónomas y las corporaciones locales», First Additional Provision of the R.D.L. 4/2003.

513 Art 3 R.D.L. 4/2003 cf. Art 4 R.D. 1053/2003, see http://www.consorseguros.es [23 May 2009]

514 London Steamship Owners' Mutual Insurance Association

515 92FUND/EXC.29/4 of 9 June 2005, paragraphs 5.8 – 5.10

516 Art 2 R.D.L. 4/2004

517 First Additional Provision of R.D.L. 4/2003

518 92FUND/EXC.44/4

519 Figures from 92FUND/EXC.44/4

520 92FUND/EXC.22/8 of 7 October 2003, paragraph 14.4

total of 359 million €, by which interim payments between 15 and 30% has been made.[521]

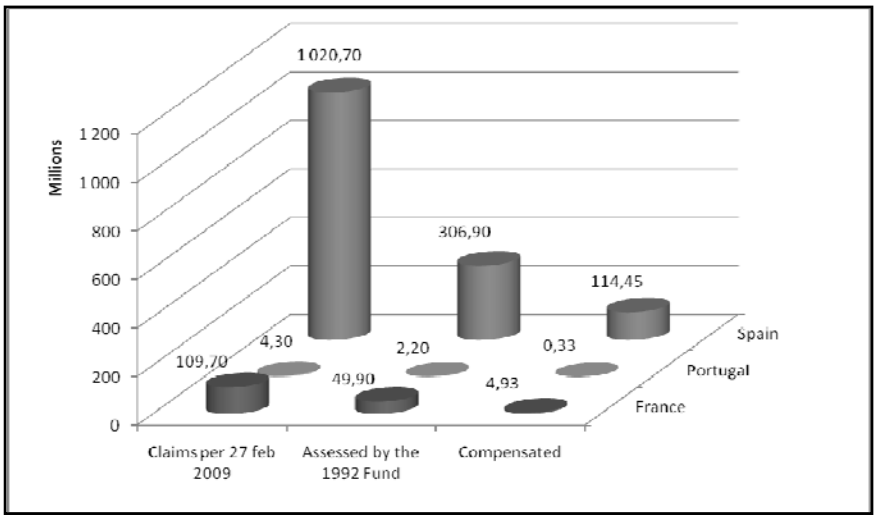

Figure A.3: Claimed, assessed and compensated damage (Prestige, 2002)

In respect of the Spanish claims it is interesting to notice that out of the 844 submitted claims totalling to an amount of 1 020 704 893 €; 14 claims from the Government came to a total of 968 500 000 €, and thus corresponded to 95 % of the entire amount. These claims relate to costs incurred in respect of at sea- and on shore clean-up operations, removal of oil from the wreck, treatment of the oil residues, administration costs, tax reliefs for businesses affected by the spill, costs incurred by local authorities and paid by the Government, costs related to publicity campaigns, and compensation payments made in the basis of the R.D.L. 4/2003 and 4/2004.[522] Among the parties who signed agreements with the State on advance compensation pursuant to these R.D.L, are 19 500 workers in the fisheries sector, other claimants whose claims have been assessed by the *Consorcio*, sixty-seven towns and the Autonomous Communities of Galicia, Asturias, Cantabria and the Basque Country.[523]

Besides the compensatory measures, the costs of removing oil from the sunken tanker came to a total of 109, 2 million €. This cost has not been undertaken entirely by the Spanish State, as it was partly compensated through a funding of 84 million € from the EU Solidarity Fund.[524] As a result, the claim

[521] Figures from 92FUND/EXC.44/4

[522] 92FUND/EXC.44/4 paragraph 4.1.1

[523] 92FUND/EXC.44/4 paragraph 4.1.1

[524] 92FUND/EXC.34/8 of 18 September 2006, paragraph 7.1, cf. COM(2004)0397 final

presented to the 1992 Fund only reached a total of 24, 2 million €. The treatments of oil residues came to an additional cost of 896 533 €.[525] As a total, the costs for clean-up operations only constitute 1 % of the overall costs submitted to the Claims Handling Office by the Spanish Government. The apportionment on the different type of measures undertaken by the Spanish Government is illustrated in Figure 10.2.

The total amount of costs incurred under the financial measures adopted in November 2002 by means of tax reliefs, waivers of social security payments, promotion of fish products from the affected areas and daily grants of 40 € to fishermen, shellfish farmers and others affected by the fishing bans, is not clear. It is however presumable that these costs have raised the percentage of costs incurred by the Government for undertaking compensatory measures. According to a Note submitted to the 1992 Fund by Spain, the Government had spent more than 70 million € on «Value Added Tax (VAT), tax concessions, and rebates on Social Security contributions» by February 2008.[526]

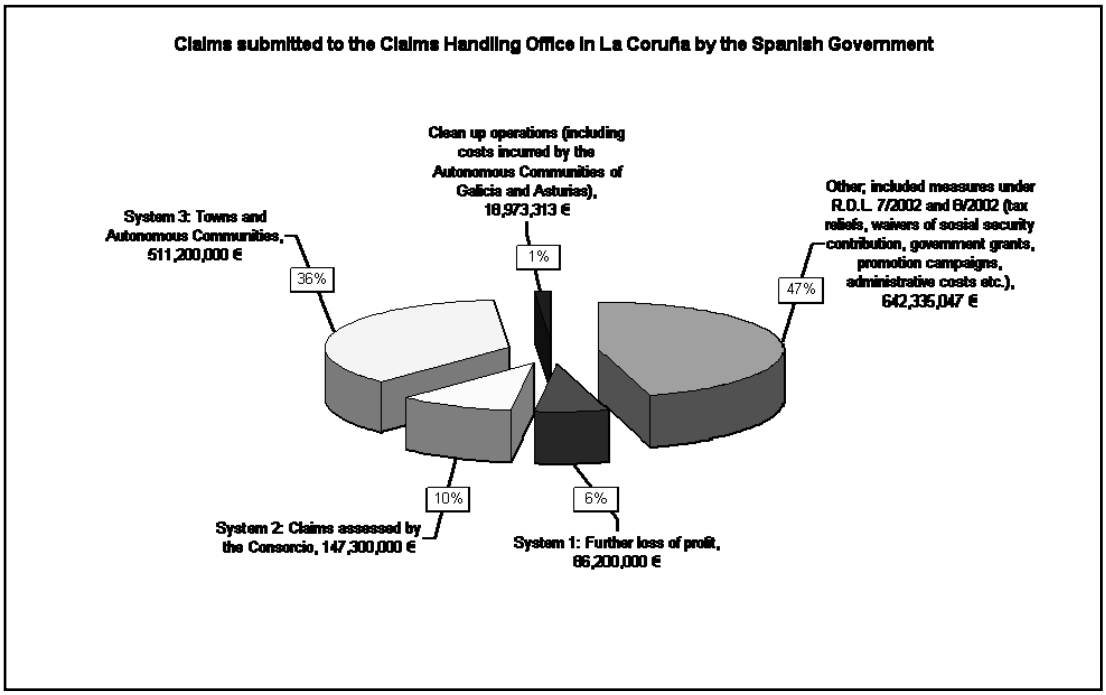

Figure A.4:

Apportionment of claims submitted by the Spanish Government[527]

525 92FUND/EXC.40/5/1 of 26 February 2008, paragraph 1.2

526 1992FUND/EXC.40/5/1 of 26 February 2008 paragraph 1.5

527 Figures obtained from 92FUND/EXC.26/8/2 of 12 October 2004, 92FUND/EXC.34/8 of 18 September 2006, 92FUND/EXC.34/8/1 of 4 October 2006 and 92FUND/EXC.40/5 of 18 February 2008.

The measures undertaken by the Spanish Government did for one provide for a temporary expedient in the months after the oil reached shore. They have also permitted every injured party finding who found it reasonable to accept the offers to obtain compensation. In addition it can be said that they have contributed to simplify the judicial process by inserting the State as the principal plaintiff, and thus avoid having hundreds of injured parties appearing before court.[528] A claimant would get full compensation to the extent calculated by the use of objective estimates or individual assessment carried out by the Consorcio in cooperation with the London Club and the 1992 Fund. As the individual assessment was based on the criteria applied under the CLC 92 and the 1992 Fund Convention and in cooperation with entities familiar with such operations, it is likely that the assessment was similar to the one applied by the P&I Clubs and the Fund themselves.

While the general opinion seems to be pleased with the established system,[529] it has also been subject to criticism and accused of being a hidden intent to shield the State from further liability.[530]

However, the main problem lies in the fact that the CLC 92 and the 1992 Fund Convention did not provide enough compensation to cover all the claims. As claimants are entitled to the same proportion of the available funding under these Conventions, the compensation was distributed throughout interim payments between 15 and 30%.[531] Nevertheless; since 2002 the limits of the CLC 92 and the 1992 Fund Convention have been subject to a 50% increase, and the 2003 Supplementary Fund Protocol has entered into force providing yet another tier of compensation. If an accident like the sinking of the Prestige should happen again, about eight times as much compensation will be available under the Oil Pollution Funds. As for oil spill under the Bunkers Convention, it is important to remember that the ordinary limits provided for under the LLMC 76/96, does not apply to the clean-up operation within neither Norwegian nor Spanish law.[532]

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528 Castro Rey (2006) p. 7

529 Represented by Castro Rey (2006) p. 7 and Pulido (2007) p. 168

530 Puig, Antoni Rubí i. El blindaje del Gobierno en la crisis del «Prestige». Comentario al Real Decreto Ley 4/2003, de 20 de junio, de ayudas a los damnificados. In: InDret 4/2003 (online). http://www.indret.com/pdf/169_es.pdf [1 June 2009]

531 As of 27 February 2009

532 See Chapter IV10.5

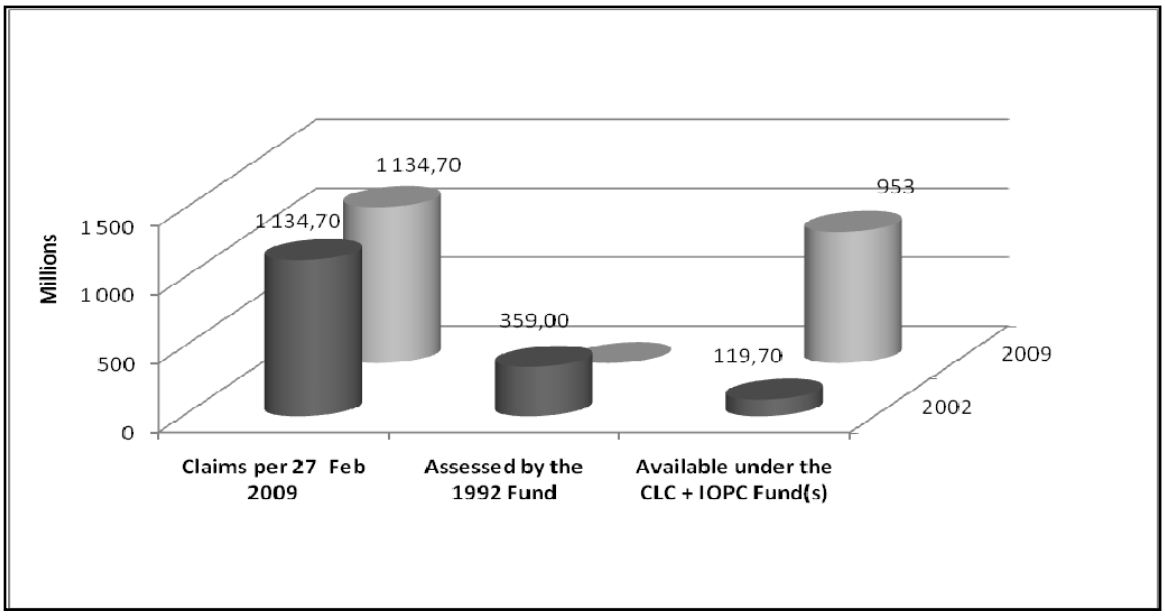

Figure 10.5: A comparison of the available funding in 2009 and 2002 (based on the exchange rate as of 27 March 2003)

Nevertheless, more funding does not equal full compensation for all types of claims. This was pointed out by the Spanish Government in the above mentioned note of 26 February 2008 in relation to costs incurred through payments of Value Added Tax, tax reductions and waivers on Social Security contributions.[533] In such a perspective, it can be said that the Spanish Government has undertaken to provide the injured parties with a right to compensation exceeding the rights that would have been available to Norwegian claimants under similar circumstances. However, these measures were taken as a response to one incident, and do not represent a general set of rules.

[533] 1992FUND/EXC.40/5/1 of 26 February 2008 paragraph 1.5

Abbreviations

1971/ 1992 Fund	The International Oil Pollution Compensation Fund, 1971/1992
1971/1992 Fund Convention	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971/1992
2003 Supplementary Fund	The International Oil Pollution Supplementary Fund, 2003
2003 Supplementary Fund Protocol	Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992
BOCG	Boletín Oficial de las Cortes Generales
BOE	*Boletín Oficial del Estado* (Official State Gazette)
Bunkers Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage (2001)
CC	*Código Civil, 1889* (Civil Code)
CCom	*Código de Comercio, 1885* (Commercial Code)
CE	*La Constitución Española, 1978* (Spanish Constitution)
CLC 69/92	International Convention on Civil Liability for Oil Pollution Damage (1969/1992)
CP	*Código Penal, 1995* (Criminal Code)
ECR	European Court Reports (official reports of the judgements of the European Court, English version)
EEA	European Economic Union
EFTA	The European Free Trade Association
FAL	*Forsikringsavtaleloven 1989* (The Norwegian Insurance Contract Act)
ICJ	International Court of Justice
IMO	International Maritime Organization
IOPC Funds	1992 Fund and 2003 Supplementary Fund
LCS	Ley de Contrato de Seguro (1980)
LLMC 76/96	Convention on Limitation of Liability for Maritime Claims (1976/1996)
LOTC	Ley Orgánica del Tribunal Constitucional, 1979 (Constitutional Court Act)
LPEMM	*Ley de Puertos de Estado y de la Marina Mercante, 1992* (State Ports and Merchant Shipping Act)
LRJAP	*Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, 1992* (the Spanish Public Administrations Act)
NC	*Den norske Grunnlov,* 1814 (The Norwegian Constitution)
NMC	*Sjøloven, 1994* (Norwegian Maritime Code)
NPCA	*Forurensningsloven, 1981* (The Norwegian Pollution Control Act)

OJ	Official Journal (L = legislatio, C = communicatio)
OPA 90	Oil Pollution Act (1990) USA
PLGNM	*Proyecto de Ley General de la Navegación Marítima*
R.D.	Real Decreto
R.D.L.	Real Decreto-Ley
Rt.	Retstidend (Supreme Court Report)
SDR	Special Drawing Right
SKL	*Skadeserstatningsloven*, 1969 ([Norwegian] Act relating to compensation in certain circumstances)
STOPIA	Small Tankers Pollution Indemnification Agreement
TOPIA	Tankers Pollution Indemnification Agreement
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

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1969	Vienna Convention on the Law of Treaties 1969 (VCLT)
1969	International Convention Relating to Intervention on the High Sea in Cases of Oil Pollution Casualties 1969
1971	International Convention on the Establishing of an International Fund for Compensation for Oil Pollution Damage 1971 (1971 Fund Convention)
1976	Convention on limitation of liability for maritime claims 1976 (LLMC 76)
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1996	1996 Protocol to the Convention on limitation of liability for maritime claims 1976 (The consolidated text as amended by the 1996 Protocol is referred to as LLMC 76/96)
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2004	Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56)
2005	Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. (OJ 2005 L 255, p. 11)
2006	Directive 2006/12/EC of the European Parliament and of the Council on waste (OJ 2006 L 114, p. 9)
2008	Directive 2008/99/EC on the protection of the environment through criminal law (OJ 2008 L 328, p. 28)
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2002	Council Decision 2002/762/EC authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (OJ 2002 L 256, p. 7)
2004	Council Decision 2004/246/EC authorising the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and authorising Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments (OJ 2004 L 78, p. 22)
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1814 Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17de Mai 1814 (Grunnloven), av 17. mai 1814 (*The Norwegian* Constitution; NC)

1902 Almindelig borgerlig Straffelov (Straffeloven) av 22. mai 1902 nr, 10 *(General Civil Penal Code)*

1969 Lov om skadeserstatning av 13. juni 1969 nr. 26 (*Act on Tort Law*; SKL)

1981 Lov om vern mot forurensninger og om avfall (forurensningsloven) av 13. mars 1981 nr. 6 (*The Norwegian Pollution Control Act;* NPCA)

1981 Lov om rettergangsmåten i straffesaker (straffeprosessloven) av 22. mai 1981 nr. 25 (*The Norwegian Criminal Procedures Act)*

1984 Lov om havner og farvann m.v. (havneloven) av 8. juni 1984 No. 51 *(The Harbour Act)*

1987 Forsikringsavtaleloven av 16. juni 1989 nr. 69 (*the Norwegian Insurance Contracts Act*, FAL).

1992 Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven) av 27. november 1992 nr. 109 (*The Norwegian EEA Act*)

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1999 Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) av 21. mai 1999 nr. 30 *(The Norwegian Human Rights Act)*

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Ot.prp.nr.32 (1982-1983)	Om lov om endringer i lov 20. juli 1893 nr. 1 om sjøfarten mm.
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Ot.prp.nr.21 (1994-1995)	Lov endringar i lov 24 juni 1994 nr 39 om sjøfarten (sjøloven) m.m (ansvar for skade ved oljesøl frå skip)
Ot.prp.nr.79 (2004-2005)	Om lov om endringar i lov 24. juni 1994 nr. 30 om sjøfarten (sjøloven) (ansvar for oppryddingstiltak etter sjøulukker m.m.)
Ot.prp.nr.77 (2006-2007)	Om lov om endringer i lov 24. juni 1994 nr. 39 om sjøfarten (sjøloven) og om samtykke til ratifikasjon av den internasjonale konvensjon 2001 om erstatningsansvar for bunkersoljesølskade
Ot.prp.nr.16 (2008-2009)	Om lov om endringer i lov 24. juni 1994 nr. 39 om sjøfarten (sjøloven) mv.
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1995	Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. BOE núm. 28 de 24/11/1995
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1979	Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional. Publicada en el BOE núm. 239 de 5/10/1979 (*L.O. on the Constitutional Court,* LOTC)

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1882	Ley de Enjuiciamiento Criminal, de 14 de septiembre 1882. BOE núm. 260 de 17/09/1882 *(The Spanish Criminal Procedure Act; LECrim)*
1978	Ley 15/1978 de 20 de febrero, sobre Zona Económica. BOE núm 46 de 23/02/1978
1980	Ley 50/1980 de Contrato de Seguro de 8 de octubre, BOE núm. 250 de 17/10/1980 (t*he Spanish Insurance Contracts Act* ,LCS),
1992	Ley 27/1992, de 24 de noviembre, de Puertos del Estado y de la Marina Mercante, BOE núm. 283 de 25/11/1992 *(State Ports and Merchant Shipping Act, LPEMM*)
1992	Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. BOE núm. 285 de 27/11/1992 (*the Spanish Public Administrations Act*, RJAP)
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